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No. _____

In The

Supreme Court of the United States

October Term, 1998

JERRY GOETZ, d/b/a JERRY GOETZ AND SONS, individually and on behalf of others similarly situated,

Petitioner,

v.

DAN GLICKMAN, Secretary, United States Department of Agriculture; WILLIE REIBEL; RODNEY and LARRY MENSE; JAN LYONS; KANSAS LIVESTOCK ASSOCIATION; NATIONAL CATTLEMEN'S ASSOCIATION; and, NATIONAL LIVESTOCK AND MEAT BOARD;

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This is a constitutional challenge of the Beef Promotion and Research Act of 1985 ("BPA"), 7 U.S.C. §§ 2901-2911 (1997), and all orders, rules, and regulations promulgated thereunder.

The questions presented are:

1. Does the BPA overstep the limit of Congress' power under the Commerce Clause?

2. Is the BPA an unconstitutional tax?

3. Does the BPA violate the First Amendment?

4. Does the BPA violate the Fifth Amendment?

PARTIES TO THE PROCEEDINGS

The petitioner is Jerry Goetz, d/b/a Jerry Goetz and Sons. (This case was filed as a class action with the intended class to include all persons subject to the BPA, including all persons who now are or have ever been required to pay a non-refundable assessment under the BPA and all "collecting persons" as defined in the BPA but such class was never certified.)

The respondents are:

> Dan Glickman, individually, the only defendant named in the original petition in the case below; and,
>
> Willie Reibel, Rodney and Larry Mense, Jan Lyons, Kansas Livestock Association, National Cattlemen's Association, and National Livestock and Meat Board, all of whom intervened into the case while it was still before the district court below.

The Kansas Livestock Association, a Kansas non-profit corporation, is a private association of beef producers who are based in Kansas. The National Cattlemen's Association, a Colorado non-profit corporation, is a private association whose members are from all sectors of the cattle and domestic beef industry. The National Livestock and Meat Board, an Illinois non-profit corporation, is also a private trade association within the beef industry.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review this case decided below by the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is at 149 F.3d 1131 (10th Cir. 1998) and is reprinted in the Appendix ("App.") at App. 1-23. The opinion of the United States District Court for the District of Kansas is at 920 F.Supp. 1173 (D.Kan. 1996) and is reprinted at App. 24-46.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on July 10, 1998. The Court has jurisdiction to review this petition pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

U.S. CONST. art. I, § 2, cl. 3, the relevant part of which provides:

> [D]irect Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including

> those bound to Service for a Term of Years and excluding Indians not taxed, three fifths of all other Persons.

U.S. CONST. art. I, § 8, cl. 3, the relevant part of which provides:

> The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]

U.S. CONST. art. I, § 9, cl. 4, the relevant part of which provides:

> No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

U.S. CONST. amend. I, the relevant part of which provides:

> Congress shall make no law * * * abridging the freedom of speech, * * * or the right of the people peaceably to assemble * * * .

U.S. CONST. amend. V, the relevant part of which provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * * .

The Beef Promotion and Research Act of 1985 ("BPA"), 7 U.S.C.S. §§ 2901-2911 (1997), which is reprinted in its entirety at App. 47-67.

The Beef Promotion and Research Order ("Order"), together with other rules, regulations and procedures implementing the BPA, 7 C.F.R. §§ 1260.101-1260.640

(1994). Only the parts thereof which are cited in this petition are reprinted at App. 68-79.

STATEMENT OF CASE

Under the BPA, beef producers and importers are compelled to finance generic advertising of beef and beef products through a $1.00 per head assessment imposed upon all cattle sold in the United States. The following is an overview of the BPA which tracks the flow of funds collected under the assessment imposed thereunder.

Under the BPA, an assessment of $1.00 per head must be paid by producers on cattle sold within the United States.[1] 7 U.S.C.S. § 2904(8)(C); 7 C.F.R. § 1260.172(a)(1); 7 C.F.R. § 1260.310(a). In most instances, the one purchasing cattle from the producer is responsible for insuring that the assessment is collected. 7 U.S.C.S. § 2904(8)(A); 7 C.F.R. § 1260.106; 7 C.F.R. § 1260.311(a). Such a purchaser is called a "collecting person". *Id.*

In states where there is a qualified State beef council, all collecting persons are required to collect the assessment from the producer and remit the assessment to that qualified State beef council. 7 U.S.C.S. § 2904(8)(A); 7 C.F.R. §§ 1260.172(a)(5), 1260.311(a), 1260.312(c). Most qualified State beef councils are private trade associations within the beef industry closely connected to the state for which they are certified. *See* 7 U.S.C.S. §§ 2902(14),

[1] In addition, an assessment is imposed upon all cattle, beef, and beef products sold by importers within the United States. 7 U.S.C.S. § 2904(8)(C); 7 C.F.R. § 1260.172(b)(1).

2904(8); Intervenors' December 1, 1994 "Memorandum of Points and Authorities in Support of Petition For Leave to Intervene" ("Intervenors' Memorandum"), filed in the district court below, pp. 11-15 (relevant excerpts reprinted at App. 80-83). The requirements for certification as a qualified State beef council are set forth in 7 C.F.R. § 1260.181(b). There can be only one qualified State beef council in any state. 7 U.S.C.S. § 2904(8)(C).

Each qualified State beef council keeps one-half of the assessments it collects or receives under the BPA as its own which it expends outside of the scope of the BPA. *See* 7 U.S.C.S. § 2904(8); 7 C.F.R. § 1260.172(a)(3 & 4); Intervenors' Memorandum, App. 80-81; Bill Miller, *Ohio Walks*, BEEF TODAY, Jan. 1991, p. 20 (relevant excerpts reprinted at App. 89-90). The remaining one-half of the assessments collected by such qualified State beef councils, and all of the assessments being collected in states where there are no qualified State beef councils, are paid to the Cattlemen's Beef Promotion and Research Board ("Board"). *See* 7 U.S.C.S. §§ 2902(3), 2904(8)(B & C); 7 C.F.R. § 1260.172(a)(5 & 6); Intervenors' Memorandum, App. 80-81; *Ohio Walks*, App. 89.

The Board is a body whose members are exclusively private individuals who are producers and importers. 7 U.S.C.S. § 2904(1); 7 C.F.R. § 1260.141(b). The Board's members do not include the United States Secretary of Agriculture ("Secretary") or any other employees or officials from the Department of Agriculture. *Id.* Although the BPA provides that each of these Board members must be appointed by the Secretary, the Secretary can only make such appointments from nominations submitted to the Secretary by the very same private trade associations

to whom the Board ultimately distributes most of the funds which it obtains from the assessment imposed by the BPA. *See* 7 U.S.C.S. § 2904(1); *The Checkoff Connection*, BEEF TODAY, Feb. 1989, pp. 18-19 (App. 84-88); *Ohio Walks*, App. 89-90; *Second thoughts on checkoffs*, HOGS TODAY, Nov. 1989, p. 39 (App. 91); The Kapital Kidd II, *Commodity checkoffs have started the kettle brewing*, High Plains Journal (NE, IA & SD Edition), Nov. 20, 1989 (relevant excerpts reprinted at App. 92-93).

Some of the most significant powers of the Board are as follows:

> (a) The Board, not the Secretary, is given the power to administer the Order itself. 7 U.S.C.S. § 2904(2)(A).
>
> (b) The Board, not the Secretary, is given the power to make rules and regulations to effectuate the Order. 7 U.S.C.S. § 2904(2)(B).
>
> (c) The Board, not the Secretary, is given the power to elect members of the Board to serve on the Beef Promotion Operating Committee ("Committee"). 7 U.S.C.S. § 2904(2)(C).
>
> (d) The Board, not the Secretary, has actual custody of funds collected from assessments under the BPA. 7 U.S.C.S. §§ 2904(8) & (9); 7 C.F.R. § 1260.172(a)(5).

The Board usually meets only once a year to conduct its business. 7 U.S.C.S. § 2904(2). Therefore, the Committee is to develop the plans and projects for which the funds collected from assessments are to be distributed. 7 U.S.C.S. § 2904(4)(B & C). The Committee is also a body whose members are exclusively private individuals who are producers and importers. 7 U.S.C.S. § 2904(4)(A). The

Committee's members do not include the Secretary or any other employees or officials from the Department of Agriculture. *Id.* The Committee is composed of twenty members, ten of whom are elected by the Board from among its own members. The other ten members of the Committee are elected by a federation of qualified State beef councils from among their directors. 7 U.S.C.S. § 2904(4)(A); 7 C.F.R. § 1260.150(d). In accordance with the BPA, the Committee contracts with private trade associations within the beef industry to develop plans and projects of beef promotion which are then submitted to the Board, for its approval. 7 U.S.C.S. §§ 2904(4)(A-C), 2904(6); 7 C.F.R. §§ 1260.168(b, d, & e), 1260.169. If a proposed plan or project is approved by the Board, the Committee contracts for the implementation of such plan or project with the private trade association which developed it and funds collected from assessments under the BPA are disbursed by the Board and the Committee to such private trade association to pay for all of the costs and expenses associated with such plan or project.[2] 7 U.S.C.S. § 2904(6). Thus, most of the one-half of all assessments which the qualified State beef councils pass on to the Board plus all of the assessments paid directly to the Board from states where there are no qualified State beef councils ultimately flow through to the private trade associations within the beef industry whose members

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[2] In most cases, the private trade association which contracts for developing, screening, recommending, implementing and evaluating the results of a plan or project and receives assessment funding therefor is one and the same private trade association. *See The Checkoff Connection*, BEEF TODAY, Feb. 1989, pp. 18-19 (App. 84-88).

serve on the Board and the Committee.[3] *See The Checkoff Connection*, App. 84-88; *Ohio Walks*, App. 89-90; *Second thoughts on checkoffs*, App. 91; *Commodity checkoffs have started the kettle brewing*, App. 92-93.

The Secretary is purported to supervise the Board and the Committee in many of their functions. *See, e.g.*, 7 U.S.C.S. §§ 2904(4)(C); 2904(6)(B). However, the most significant power given to the Secretary under the BPA is the power to enforce the collection of the assessment thereunder. *See* 7 U.S.C.S. §§ 2908; 2909.

The BPA provides that within twenty-two months after the issuance of the Order, the Secretary must conduct a referendum among those persons who were producers and importers during the trial period. 7 U.S.C.S. § 2906. Under the terms of the BPA, the Order would only continue to operate upon approval by a majority of those participating in the referendum. 7 U.S.C.S. § 2906(a). Prior to the referendum, any beef producer who paid an assessment and who was not in favor of supporting the promotion and research program could demand a one-time refund of the assessments paid. 7 U.S.C.S. § 2907; 7 C.F.R. §§ 1260.173, 1260.174. On May 10, 1988, the referendum was conducted and the Order was approved, and thus, assessments are now mandatory and no longer is any portion thereof refundable. 7 U.S.C.S. § 2907; 7 C.F.R. §§ 1260.173, 1260.174; *U.S. v. Frame*, 885 F.2d 1119, 1124 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).

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[3] Obviously, some of these funds would be expended on the administrative staff of the Board and the Committee, and some would be used to reimburse the Secretary and the Department of Agriculture for its collection efforts. *See* 7 U.S.C.S. §§ 2904(4)(D), 2904(8)(C), 2906(c).

The petitioner is a Kansas farmer who buys and sells cattle as part of his farming operations. At times, the petitioner is deemed to be a producer and is subject to the $1.00 per head assessment imposed by the BPA when he sells his cattle. At other times, the petitioner is deemed to be a collecting person and is required to collect the $1.00 per head assessment imposed by the BPA from some other producer who has sold cattle to the petitioner. On October 29, 1993, an administrative proceeding against the petitioner was commenced before the Secretary in which it was alleged that the petitioner had failed to pay or collect and remit the assessment imposed by the BPA on various cattle transactions. In response to said administrative proceeding, on August 2, 1994, the petitioner filed this case in the United States District Court for the District of Kansas as a completely separate lawsuit solely for the purpose of challenging the constitutionality of the BPA. 28 U.S.C.S. § 1331 was the basis for federal jurisdiction.

On February 28, 1996, the district court issued its Memorandum and Order, which was entered on the docket on February 29, 1996, upholding the constitutionality of the BPA.[4] App. 30. Citing as its authority *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), the district court stated that the standard for reviewing the petitioner's constitutional challenge of the BPA under the Commerce Clause is as follows:

> When asked to determine whether a particular exercise of congressional power is valid under

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[4] Other issues decided by the district court below which were not appealed are not mentioned here.

> the commerce clause, the court's task is narrow. The court must defer to a congressional finding that the regulated activity affects interstate commerce if there is any rational basis for such a finding. Once this is established, the only remaining inquiry is whether the means chosen by Congress are reasonably adapted to the end permitted by the constitution. App. 32.

The district court held that the BPA was "a valid exercise of the commerce power because it is reasonably adapted to the goal of strengthening the beef industry." App. 37.

After reciting the test set forth in *Cities Service Co. v. Federal Energy Admin.*, 529 F.2d 1016 (Temp.Emer.Ct.App. 1975), the district court held that the BPA is not a tax because its primary purpose is regulation and it does not raise revenue for the general support of government. App. 39-40.

The district court concluded that the speech involved in this case is commercial speech and not government speech. App. 43. The district court ruled that the standard for reviewing restrictions on commercial speech is set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), as follows:

> (1) [T]he state must assert a substantial government interest; (2) the regulatory technique must be in proportion to that interest; (3) the incursion on commercial speech must be designed carefully to achieve the state's goal. App. 43.

In addition, the district court held that the additional free association claims in this case triggered the higher standard of scrutiny set forth in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), which provides that the BPA is constitutional only if:

> [T]he government could demonstrate that the [BPA] was adopted to serve compelling state interests, that are ideologically neutral, and that cannot be achieved through means significantly less restrictive of free speech or associational freedoms. App. 44.

The district court focused upon the *Roberts* test and concluded that the BPA did not violate the First Amendment. *Id.* In applying this standard, the district court found that the BPA was enacted to maintain and expand beef markets and held that such purpose is a compelling governmental interest. *Id.* The district court then held that such governmental interest was ideologically neutral because "[t]he government sought to bolster the image of beef solely to increase sales, not to prescribe any official view." *Id.* Finally, the district court found the BPA's infringement of the petitioner's First Amendment rights to be slight. *Id.*

Finally, the district court held that the BPA does not violate the equal protection component of the Fifth Amendment. App. 44-46. The district court reasoned that because it had already concluded that the BPA did not impinge upon the petitioner's fundamental First Amendment rights, the Fifth Amendment only required that the classification effected by the BPA "rationally further a legitimate governmental interest." App. 45. The district court gave four possible bases which it concluded were

rational. App. 45-46. First, an assessment on the initial sale of cattle is easier to administer. App. 45-46. Second, ranchers would be the most benefitted by the BPA. App. 46. Third, ranchers could pass the cost on to others. *Id.* Fourth, Congress may have wanted to grant cattle producers the maximum influence in shaping the program and therefore also imposed upon them the corresponding financial burdens. *Id.*

On March 27, 1996, the petitioner filed notice that he was appealing the district court's decision to the Tenth Circuit Court of Appeals. The Tenth Circuit reviewed the district court's decision *de novo* and filed its opinion on July 10, 1998. App. 10. In its opinion, the Tenth Circuit completely endorsed the district court's reasoning under the Commerce Clause, the Taxing Clause and the Equal Protection Clause and affirmed its holdings thereunder. App. 16, 18, 23. However, in reliance on *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S.Ct. 2130 (1997), the Tenth Circuit found that "generic advertisements do not warrant special First Amendment scrutiny under the *Central Hudson* standard." App. 20. Therefore, the Tenth Circuit found that the district court erred in applying the *Central Hudson* test to the First Amendment issues in this case but affirmed the district court's conclusion that the BPA does not violate the First Amendment under what it believed to be the reasoning of this Court in *Wileman*. App. 20, 23.

REASONS FOR GRANTING THE WRIT

I. The BPA Oversteps the Limit of Congress' Power Under the Commerce Clause.

In Kansas, the sole qualified State beef council is the Kansas Beef Council ("KBC"). *See* Intervenors' Memorandum, App. 80-81. The KBC is a separate division of a private trade association, the Kansas Livestock Association ("KLA"). *Id.* All of the assessments imposed by the BPA upon all cattle sales in the State of Kansas must be remitted to the KBC. *See* Intervenors' Memorandum, App. 80-81; 7 U.S.C.S. § 2904(8); 7 C.F.R. § 1260.172(a)(5). Of these assessments, KBC keeps $.50 of each $1.00 assessment and forwards the other $.50 to the Board. *Id.* The $.50 of each $1.00 assessment collected under the BPA which is retained by KBC becomes the sole property of KBC which KBC can expend in any manner it chooses so long as such funds are not used "for the purpose of influencing governmental policy or action, or to fund plans or projects which make use of any unfair or deceptive acts or practices." 7 C.F.R. § 1260.181(b)(7). In all other respects, KBC's expenditure of the $.50 of each dollar collected under the BPA which it retains is outside of the scope of the BPA and outside of the authority of the Board, the Committee and the Secretary.

In effect, what is described here is nothing more than taking private property from one private citizen, the beef producer, and giving it to the KBC, a division of a private trade association which represents other private interests, with virtually no strings attached. This was condemned long ago:

> "As early as 1798, Justice Chase, in his memorable dictum in *Calder v. Bull*, [3 U.S. (3 Dall.) 386, 388 (1798) (seriatim opinion),] had expressed constitutional law's undisputed condemnation of any law attempting to 'take property from A. and give it to B.' General principles of law, enforceable in a proper forum, had settled that no form of legislative authority could be employed to serve private ends: taking, taxing, and regulation were all inherently linked to the public good and depended for their legitimacy upon the preservation of that link."

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9-2, at 588 (2d ed. 1988) (footnotes omitted). How is it possible that anyone could believe this to be a valid regulation of interstate commerce under the Commerce Clause?[5]

II. The BPA is an Unconstitutional Tax.

A. The BPA Is a Tax.

To determine whether the BPA is a tax:

> The test to be applied is to view the objects and purposes of the [BPA] as a whole and if from such examination it is concluded that revenue is the primary purpose and regulation merely incidental, the imposition is a tax and is controlled by the taxing provisions of the Constitution. Conversely, if regulation is the primary purpose of the [BPA], the mere fact that incidentally revenue is also obtained does not make the imposition a tax, but a sanction imposed for the

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[5] The very same rationale is another basis for why the BPA is also an unconstitutional tax.

> purpose of making effective the congressional enactment.

Cities Service Co. v. Federal Energy Admin., 529 F.2d 1016, 1029 (Temp.Emer.Ct.App. 1975) (*quoting Rodgers v. United States*, 138 F.2d 992, 994 (6th Cir. 1943)). Viewing the objects and purposes of the BPA as a whole, it is clear that its primary purpose is to raise revenue and that the BPA is a tax.

1. Many in Congress saw the BPA as being a tax from the very outset. *See* 121 CONG.REC. 38092, 38112 (1975) (statements of Sen. Abourezk); 121 CONG.REC. 38102 (1975) (statement of Sen. Muskie); 121 CONG.REC. 38103 (1975) (statement of Sen. Thurmond); 121 CONG.REC. 38105 (1975) (written statement of economist submitted by Sen. Abourezk); 121 CONG.REC. 38112 (1975) (statement of Sen. Allen); 121 CONG.REC. 31443, 31446 (1975) (statements of Rep. Vanik); 121 CONG.REC. 31447 (1975) (statement of Rep. Richmond); 121 CONG.REC. 31449 (1975) (statement of Rep. Sullivan); and 121 CONG.REC. 31451 (1975) (statement of Rep. Ford). Those in favor of the BPA did not attempt to argue that it was intended to be a regulation of interstate commerce under the Commerce Clause, rather they denied that it was government regulation:

> This legislation was structured as a 'self-help' measure that would enable the beef industry to employ its own resources and devise its own strategies to increase beef sales, ***while simultaneously avoiding the intrusiveness of government regulation*** and the cost of government 'handouts.'

Frame, 885 F.2d at 1122 (emphasis added) (citing the Report of Committee on Agriculture, Beef Research and Information Act, H.R.REP.No. 452, 94th Cong., 1st Sess. 3 (1975)). Instead, they focused upon the refund provisions to characterize the BPA as a voluntary assessment and not a tax. *See* 121 CONG.REC. 38012 (1975) (written response prepared at the request of Sen. Dole); 121 CONG.REC. 38094 (1975) (written answers offered by Sen. Allen to charges made by Sen. Abourezk). However, the BPA no longer allows any refunds after the referendum in May of 1988. *See* 7 U.S.C.S. § 2907(a); *Frame*, 885 F.2d at 1124. Therefore, this argument now fails because the BPA is now mandatory, not voluntary.

2. The BPA itself declares that its primary purpose is to raise "financing (through assessments on all cattle sold in the United States and on cattle, beef, and beef products imported into the United States). . . . " 7 U.S.C.S. § 2901(b). A close examination of the BPA will show that its primary feature is the imposition of the assessment. 7 U.S.C.S. § 2904(8)(A)&(C). All of the other provisions of the BPA are merely incidental to and totally dependant upon the revenue-raising assessment imposed thereby.

3. In all states where there is a qualified State beef council, one-half of all of the assessments collected under the BPA flow directly from the producers through the collecting persons and into the pockets of such qualified State beef councils to be spent by such qualified State beef councils outside of the scope of the BPA and beyond

the control of the Board, the Committee, and the Secretary.[6] This flow of funds does not even suggest any regulatory purpose for which the BPA might have been enacted. However, it strongly suggests that its purpose is to raise revenue, a significant part of which goes directly to such qualified State beef councils, *i.e.*, private trade associations, to be spent outside of the scope of the BPA.

4. The remaining one-half of the assessments collected under the BPA which are not kept by the qualified State beef councils flow from producers through the collecting persons and the qualified State beef councils to the Board. Less only the amounts needed by the Board to pay its administrative staff and the costs of collection, such funds ultimately flow into the pockets of private trade associations within the beef industry as funding for various projects which were devised, implemented and evaluated by the very same private trade association which receives such funding. This flow of funds also reveals a revenue purpose and not a regulatory purpose.

5. The argument that the BPA is a tax was not before this Court in *Wileman* nor was it brought before the Third Circuit in *Frame*. *See Frame*, 885 F.2d at 1125 (footnote 4). However, the district court's opinion in *Frame* rested almost entirely upon the premise that the BPA is a tax. *See U.S. v. Frame*, 658 F. Supp. 1476, 1480-1482 (E.D.Tenn. 1987), *aff'd*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).

Clearly, the objects and purposes of the BPA when viewed as a whole show it to be a tax and not a regulation.

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[6] This aspect of the BPA was more fully examined earlier in this petition.

B. The BPA is an Unconstitutional Direct Tax.

"[T]axes on personal property, or on income of personal property, are . . . direct taxes." *Pollock v. Farmer's Loan & Trust Co.*, 157 U.S. 429, *on reh'g*, 158 U.S. 601, 637 (1895).[7] A tax on the sale of personal property can also be tax on that personal property and thus a direct tax. *Nicol v. Ames*, 173 U.S. 509 (1899).

In *Nicol*, this Court was asked to determine whether a certain tax imposed under the War Revenue Act of 1898 was a direct tax and therefore forbidden because it was not apportioned. *Nicol*, 173 U.S. at 510 & 514. Under that Act, Congress imposed a tax "[u]pon each sale, agreement of sale, or agreement to sell any products or merchandise at any exchange or board of trade, or other similar place. . . . " *Nicol*, 173 U.S. at 513. In *Nicol*, this Court held "that a tax levied upon a sale of property effected at a board of trade or exchange was an excise laid upon the privilege, opportunity or facility afforded by boards of trade or exchanges for the transaction of the business, and not upon the property or the sale thereof. . . . " *Bromley v. McCaughn*, 280 U.S. 124, 141 (1929) (Dissenting opinion of Justice Sutherland); *Nicol*, 173 U.S. at 523 & 527. This Court reasoned in *Nicol*:

> [The tax imposed under the relevant provisions of the War Revenue Act of 1898] is asserted to be a direct tax, because it is a tax upon the sale of

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[7] In *South Carolina v. Baker*, 485 U.S. 505 (1988), this Court overruled that part of *Pollock* which held that state bond interest is immune from a nondiscriminatory federal tax. However, the remainder of *Pollock* concerning what is a direct tax is alive and well and directly applicable to this case.

> property measured by the value of the thing sold, and such a tax is a direct tax upon the property itself and therefore subject to the rule of apportionment. Various cases are cited, (citations omitted), for the purpose of proving the correctness of this proposition. All the cases involved the question whether the taxes to which objection was taken amounted practically to a tax on the property. ***If this tax is not on the property or on the sale thereof, then these cases do not apply.***
>
> . . .
>
> A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. ***The latter tax is really and practically upon property.*** It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded.

Nicol, 173 U.S. at 518-519 & 521 (emphasis added).

The BPA is a direct tax. This is shown by the character of the assessment as evidenced by the statute imposing it and as determined from its incidents. *Dawson v. Kentucky Distilleries & Warehouse Co.*, 255 U.S. 288, 292 (1920).

The assessment imposed under the BPA is not an income tax. It is exacted from the beef producer regardless of whether he is realizing a gain or loss when he sells his cattle. The assessment imposed under the BPA is not an excise on a privilege or facility used in effecting cattle sales. *See Nicol*, 173 U.S. at 519. Whether a sale is made with the assistance of a board of trade, a stockyard, a sale

barn, a private individual or in any other manner is of no importance to the assessment of the BPA being imposed. The assessment under the BPA is not an excise on a certain occupation or trade. *See Dawson*, 255 U.S. at 293. The definition of producer under the BPA is extremely broad. *See* 7 U.S.C.S. § 2902(12); 7 C.F.R. § 1260.116. A child who raises one steer as a 4-H project or just as a lesson in responsibility must pay the assessment under the BPA upon the sale of that steer even though that child is not in any business. The assessment under the BPA is not an excise on a certain form of conducting business. *See Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911). Whether the cattle producer operates as a sole proprietor, a partnership, a corporation or in any other form allowed by law is of no concern. **The fact that a sale of cattle by a producer has occurred is all that is required for the assessment under the BPA to be imposed.**

In the BPA, some wording appears to make the assessment a tax upon the cattle themselves. *See* 7 U.S.C.S. § 2904(8)(C) ("The rate of assessment prescribed by the order shall be one dollar per head of cattle. . . . "). In other places, the BPA appears to make the assessment upon the sale of cattle. *See* 7 U.S.C.S. § 2904(8)(A) ("[E]ach person making payment to a producer for cattle purchased from the producer shall . . . collect an assessment and remit the assessment to the Board."). Regardless of whether the assessment imposed under the BPA is upon the cattle themselves or the sale of such cattle, the assessment is a direct tax. *Pollock v. Farmer's Loan & Trust Co.*, 157 U.S. 429, *on reh'g*, 158 U.S. 601, 637 (1895); *Nicol v. Ames*, 173 U.S. 509 (1899).

Being the assessment imposed by the BPA is not apportioned as required by the Constitution, the BPA is an unconstitutional direct tax. U.S. CONST. art. I, § 2, cl. 3; U.S. Const. art. I, § 9, cl. 4.

III. The BPA Violates the First and Fifth Amendments.

A. *Wileman* Does Not Control the First Amendment Issues Raised in this Case.

In reliance upon this Court's decision in *Wileman*, the Tenth Circuit concluded that the BPA does not violate the First Amendment. App. 18-20. But does *Wileman* control the First Amendment issues raised in this case?

Those who believe that it does appear to rely upon the following line of reasoning. The BPA which is being constitutionally challenged in this case is the same statutory scheme which was challenged before the Third Circuit in *Frame*. App. 7 (footnote 3). In the majority's opinion in *Wileman*, Justice Stevens states that the petition for *certiorari* was granted in that case specifically to allow this Court to resolve the conflict between the Third Circuit's decision in *Frame* and the Ninth Circuit's decision in *Wileman*. *See Wileman*, 117 S.Ct. at 2137; App. 19. Therefore, this Court must have intended that *Wileman* control the First Amendment issues in this case.

However, the actual opinion of the majority in *Wileman* is completely at odds with such a conclusion. After stressing the importance of the statutory context in which that case arose, Justice Stevens clearly and carefully

restricted the *Wileman* decision in ways which remove the facts in *Frame* and in this case from its reach as is hereafter shown.

Unlike the statutory scheme challenged in *Wileman*, the BPA is not part of the Agricultural Marketing Agreement Act of 1937, ch. 296, 50 Stat. 246, *as amended*, 7 U.S.C. § 601 *et seq.*, nor is it a part of any other broader detailed regulatory scheme which restricts overall competition in the beef industry. *See Wileman*, 117 S.Ct. at 2138. The BPA is "free-standing" legislation that exists only to collect assessments to be used for promotion, advertising, and research. 7 U.S.C.S. § 2901-2911 (1997). In fact, the sole and overriding purpose of the BPA is to compel association and speech.

Unlike the sector of the economy involved in *Wileman*, the beef industry is highly competitive and no part thereof is exempted from the antitrust laws. *See Wileman*, 117 S.Ct. at 2138.

Finally, unlike the statutory scheme challenged in *Wileman* and contrary to the Third Circuit's opinion in *Frame*, the BPA ***does compel*** beef producers and importers to finance ideological views.[8] *See Wileman*, 117 S.Ct. at 2138. Medical research has linked the consumption of red

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[8] The problem in *Frame* was that the appellant in that case "failed to characterize his objection to the advertisements in a manner that would allow a reviewing court to reasonably infer a dispute over anything more than strategy." *Frame*, 885 F.2d at 1137. But, as shown here, the real issue being raised is compelled funding of ideological views contrary to First Amendment rights, not mere strategy.

meat (principally beef) with colon cancer, prostrate cancer and heart disease. *See* Red Alert on Red Meat, TIME, Dec. 24, 1990, at 70 (relevant excerpts reprinted at App. 94); Nutrition, SCIENCE NEWS, Feb. 19, 1994, at 126 (relevant excerpts reprinted at App. 95); A Fresh Attack On Red Meat, U.S. NEWS & WORLD REPORT, Dec. 31, 1991, at 67 (relevant excerpts reprinted at App. 96-97). Despite these medical findings, the purpose of the BPA is to compel beef producers and importers to finance communications to consumers through various modes of advertising that advance the view that the consumption of beef is desirable, healthy and nutritious to bolster the image of beef and increase the consumption of beef and beef products. *See Frame*, 885 F.2d at 1135-1137. Both the purpose and the message are ideological in that the purpose is to establish and the message expresses the "doctrine, opinion or way of thinking" that the consumption of beef is healthy and desirable in the face of contrary medical evidence. *See Webster's New Twentieth Century Dictionary of the English Language* 902 (1971). In the highly publicized case about Mad Cow Disease involving Oprah Winfrey which turned on certain speech concerning the danger associated with beef consumption, the United States District Court for the Northern District of Texas, Amarillo Division, in giving such speech the highest level of First Amendment protection, made the following statement:

> It would be difficult to conceive of any topic of discussion that could be of greater concern and interest to all Americans than the safety of the food that they eat.

Texas Beef Group v. Oprah Winfrey, Civil Action Cause Number 2:96-CV-208-J (N.D.Tex, Amarillo Div. Feb. 27,

1998) (Amended Order) (excerpts reprinted at App. 98-100).

In conclusion, unlike the statutory scheme examined in *Wileman*, the BPA implicates the petitioner's fundamental First Amendment rights and warrants special First Amendment scrutiny. *See Frame*, 885 F.2d at 1133.

B. The Applicable Standards and Presumptions for Reviewing the First and Fifth Amendment Claims Against the BPA.

The speech implicated by the BPA is commercial speech not government speech.[9] *See Frame*, 885 F.2d at 1130-1133. Therefore, the three-part test established in *Central Hudson* for lawful, non-misleading commercial speech is the standard for reviewing the free speech and freedom of belief/conscience claims being raised against the BPA. *See Frame*, 885 F.2d at 1133. The standard for reviewing the free association claims being raised against the BPA is the higher standard of scrutiny set forth in *Roberts*. *Id.* at 1134. Finally, being the petitioner's fundamental First Amendment rights are implicated by the BPA, the standard for reviewing the equal protection claim against the BPA is that the BPA must be "precisely tailored to further a compelling [governmental] interest.[10] *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307

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[9] This issue was not considered by this Court in *Wileman*. *Wileman*, 117 S.Ct. at 2145 (footnote 2) (Souter, J. dissenting).

[10] This higher standard of review was not considered by the Third Circuit in *Frame*. *See Frame*, 885 F.2d at 1138 (footnote 14).

(1976). For the purposes of applying all three of these tests, the BPA is presumed to be unconstitutional and the burden is shifted to the respondents to prove otherwise. *Frame*, 885 F.2d at 1134. The burden which the respondents must overcome to uphold the BPA is a heavy one. *Id.*

C. Applying the Standards.

Failure to satisfy everyone of the prongs of each of the foregoing tests is a failure to overcome the presumption that the BPA is unconstitutional. The BPA does not satisfy all of the foregoing tests as shown below.

1. As previously shown in this petition, both the purpose for enacting the BPA and the message funded by the BPA are far from being ideologically neutral. Therefore, the BPA is unconstitutional under *Roberts*.

2. Even if the pro-beef ads funded by assessments under the BPA were considered government speech, the petitioner's First Amendment rights would still be implicated under the "close nexus" rationale employed by the Third Circuit in *Frame*. *See Frame*, 885 F.2d at 1132-1133. Thus, even as government speech, the BPA would be unconstitutional.

3. Based upon the Secretary's figures, only 52% of the retail beef consumers' choice meat dollars come back to beef producers. *See* WILLIAM H. LESSER, MARKETING LIVESTOCK AND MEAT 155 (Food Products Press, 1993) (relevant section reprinted at App. 101). This means that 48% of the retail beef consumers' choice meat dollars go to others within the beef industry who are not required to pay the

assessment under the BPA. Several observations follow from this.

(a) The foregoing shows why the petitioner has challenged the BPA under the Equal Protection component of the Fifth Amendment.

(b) Avoiding a free-rider problem cannot possibly be a substantial, a compelling, or even a rational governmental interest under First and Fifth Amendment analysis because the BPA actually creates a substantial free-rider problem rather than curing one. *But see Frame*, 885 F.2d at 1135.

4. In *Frame*, the majority believed that an important non-economic interest which the BPA served was that it preserved the "American cattlemen's traditional way of life." *Frame*, 885 F.2d at 1134-1135. This statement reveals a lack of familiarity with the producers' sector of the beef industry in the United States. Over 50% of all fed beef marketed in the United States in 1989 were produced by only 20 feedlots, the top five of which were owned and operated by very large and powerful corporations. William Heffernan, Douglas Constance and Robert Gronski, Concentration of Agricultural Markets (1994) (unpublished study, University of Missouri (Columbia)) (on file with authors) (relevant portion reprinted at App. 102). Is the important non-economic interest which the BPA serves preserving the traditional way of life of Continental Grain, ConAgra, Cargill or the stockholders, directors, officers or employees of these big corporations? Or is it the traditional way of life of the doctors, lawyers, accountants or other professional or business persons who commercially contract to have cattle fed in large feed

lots throughout the United States? Surely this is not a compelling governmental interest or even a substantial governmental interest.

5. Prior to 1988, producers who objected to the assessment under the BPA could apply for and receive a refund. *See* 7 U.S.C.S. § 2907. Allowing objecting producers to receive a refund seriously undermines the existence of a substantial or compelling governmental interest.

6. Allowing producers to vote in a referendum as to whether or not the BPA should continue effectively undermines the position that a substantial or compelling governmental interest exists for enacting the BPA. *See* 7 U.S.C.S. § 2906.

7. There are several alternatives to the approach taken under the BPA which would be far more effective in helping the producer financially while at the same time being far less restrictive of the petitioner's First Amendment rights.

> (a) Less state and federal regulations which adversely affect the beef industry by destroying markets, depressing prices and decreasing beef imports. *See* 121 CONG.REC. 31433 (1975) (statement of Rep. Sebelius); 121 CONG.REC. 31451 (1975) (statement of Rep. Poage).
>
> (b) A revamping of the beef grading system and beef grading standards used in this country. *See* 121 CONG.REC. 31438, 31446 (1975) (statements of Rep. Peyser).
>
> (c) Investigation of and legal action against collusion, fraud and price-fixing within

> the beef industry which has unfairly reduced the prices beef producers receive in spite of increasing retail prices which consumers are paying for beef. *See* 121 CONG.REC. 31449 (1975) (statement of Rep. Fenwick); 121 CONG.REC. 31450 (1975) (statement of Rep. Heckler); 121 CONG.REC. 31453 (1975) (statement of Rep. Harkin); 121 CONG.REC. 31453 (1975) (statement of Rep. Roncalio).

In addition, Congress can appropriate and spend the general revenues of the Treasury, which have been collected through constitutional taxation, on the promotion of beef if Congress truly believes it to be in the public interest. Or Congress could make it a completely voluntary program again by allowing full refunds to any producers who do not wish to participate.

CONCLUSION

As the foregoing shows, the Tenth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. Therefore, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

CITATION:

Goetz v. Glickman, 149 F.3d 1131 (10th Cir. 1998).

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JERRY GOETZ d/b/a JERRY GOETZ and SONS, individually and on behalf of others similarly situated,	)	
Plaintiff-Appellant,	)	No. 96-3120
v.	)	
DAN GLICKMAN, Secretary, United States Department of Agriculture,	)	
Defendant-Appellee,	)	(Filed
and	)	Jul. 10, 1998)
WILLIE REIBEL, RODNEY and LARRY MENSE, JAN LYONS, KANSAS LIVESTOCK ASSOCIATION, NATIONAL CATTLEMEN'S ASSOCIATION, and NATIONAL LIVESTOCK AND MEAT BOARD,	)	
Intervenors-Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS
(D. Ct. No. 94-1299-FGT)
(920 F. Supp. 1173)

David R. Klaassen (Clarence L. King and Brian W. Wood of Hampton, Royce, Engleman & Nelson, L.C., Salina, Kansas, with him on the brief), Marquette, Kansas, appearing for Plaintiff-Appellant.

Douglas N. Letter and Sushma Soni, United States Department of Justice, Washington, D.C., appearing for Defendant-Appellee.

Wayne Watkinson and Richard T. Rossier of McLeod, Watkinson & Miller (John G. Roberts, Jr. and Gregory G. Garre of Hogan & Hartson, L.L.P., Washington, D.C., with them on the brief), Washington, D.C., appearing for Intervenors-Appellees.

Before **MURPHY** and **LOGAN**, Circuit Judges, and **MILES-LaGRANGE**, District Judge.*

MILES-LaGRANGE, District Judge.

Plaintiff Jerry Goetz ("Goetz"), a Kansas cattle farmer, appeals the district court's ruling in favor of Dan Glickman, Secretary, U.S. Department of Agriculture ("Secretary"). Goetz claims the Beef Promotion and

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* The Honorable Vicki Miles-LaGrange, United States District Judge of the Western District of Oklahoma, sitting by designation.

Research Act of 1985, 7 U.S.C. § 2901(a) ("Beef Promotion Act" or "Act"), is unconstitutional. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm.

Facts and Proceedings Below

Goetz filed this class action lawsuit against the Secretary contending that his and other class members' constitutional rights are being violated because they must pay a $1.00 per head "assessment" on the sale and importation of cattle as authorized by the Beef Promotion Act. The district court's decision provides a succinct description of the Act's regulatory scheme:

> The Act directs the Secretary to promulgate a Beef Promotion and Research Order ("the Order"), that provides for financing beef promotion and research through the assessments on cattle sold in the United States and cattle, beef, and beef products imported into the United States. 7 U.S.C. § 2901(b), 2903, 2904(8)(A)-(C). The Order established by the Secretary (7 C.F.R. Part 1260, Subpart A) established the Cattlemen's Beef Promotion and Research Board ("the Cattlemen's Beef Board") and the Beef Promotion Operating Committee ("the Operating Committee"). 7 U.S.C. § 2904(1)-(7); 7 C.F.R.1260.141,1260.161. The Cattlemen's Beef Board is made of cattle producers and importers appointed by the Secretary. 7 U.S.C. § 2904(1); 7 C.F.R. 1260.141. The Board's principal duties are to administer the Order, make rules and regulations to effectuate the terms and provisions of the Order, elect members of the Board to serve on the Operating Committee, to approve or disapprove the budget submitted by the Operating

Committee, to receive, investigate and report to the Secretary complaints of violations of the Order, and [to] recommend to the Secretary amendments to the Order. 7 U.S.C. § 2904(2)(A)-(F).

The Operating Committee is composed of ten members of the Cattlemen's Beef Board and ten members elected by a federation of State beef councils. 7 U.S.C. § 2904(4)(A); 7 C.F.R. 1260.161. The Operating Committee develops and submits to the Secretary for approval promotion, advertising, research, consumer information and industry information plans and projects. 7 U.S.C. § 2904(4)(B); 7 C.F.R. 1260.168. The Act prohibits the use of funds for political purposes. 7 U.S.C. § 2904(10).

The Act requires cattle producers in the United States to pay a one dollar per head assessment on cattle sold in this country. 7 U.S.C. § 2904(8)(A) & (C); 7 C.F.R.1260.172 (a)(1), 1260.310. Each person making payment to a cattle producers [sic] for cattle is a "collecting person" who is required to collect the assessments and remit them to a qualified State beef council in the State in which the collecting person resides, or, if there is no qualified State beef council, to the Cattlemen's Beef Board. 7 U.S.C. § 2904(8)(A); 7 C.F.R. 1260.311(a), 1260.312(c). Each collecting person must report to the Board certain information for each calendar month at the time the assessments are remitted and must maintain and make available for the Secretary's inspection the records necessary to verify the reports. 7 U.S.C. § 2904(11); 7 C.F.R. 1260.201, 1260.312(a)-(c), 1260.202.

The Secretary is authorized to conduct investigations and to issue subpoenas to determine if there has been a violation of the Act, the Order, or the rules and regulations thereunder. 7 U.S.C. § 2909. After an administrative hearing, the Secretary may issue an order restraining violations and may impose a civil penalty of up to $5,000 for each violation of the Act and the Order. *Id.* § 2908(a). In addition, the Secretary may request the Attorney General to initiate a civil action to enforce, and to restrain a person from violating, any order or regulation under the Act. *Id.* § 2908(b), (c).

Within 22 months of the issuance of the Order, the Act required the Secretary to conduct a referendum among those persons who were producers and importers during that trial period. The Order would continue to operate only upon approval by a majority of those participating in the referendum. 7 U.S.C. § 2906(a). Prior to the referendum, a cattle producer who paid the assessment could demand a one-time refund. *Id.* § 2907; 7 C.F.R. 1260.173, 1260.174. On May 10, 1988, the referendum was conducted and the Order was approved.

Plaintiff is a "producer" within the meaning of the Act. 7 U.S.C. § 2902(12). As a producer, plaintiff is subject to the one dollar per head assessment upon the sale of cattle. Plaintiff alleges that at times he makes payments to other producers for cattle purchased from such producers, and thus he is a "collecting person" under the Act. *Id.* § 2904(8)(A). As a collecting person, plaintiff is subject to the collecting provisions of the Act and accompanying regulations.

See Goetz v. Glickman, 920 F. Supp. 1173, 1176-77 (D.Kan.1996) (footnote omitted).

On October 29, 1993, the Secretary commenced administrative proceedings against Goetz because he failed to comply with the Beef Promotion Act and pay the assessment. A hearing before an administrative law judge was set for August 8, 1994. On August 2, 1994, Goetz filed a civil action in district court and moved for a temporary restraining order to enjoin the Secretary from proceeding with the administrative hearing. The district court entered a temporary restraining order which expired on August 15, 1994. On August 19, 1994, the parties agreed, with the court's approval, to stay the administrative proceedings until October 1, 1994. As part of the agreement, Goetz agreed to let an accounting firm audit his company. Over the objection of the Secretary, the district court continued the stay throughout the litigation.

Four Kansas cattle producers and three non-profit associations representing cattle producers in Kansas and throughout the nation intervened in the lawsuit to defend the Act.[1] On Dec. 8, 1995, the district court heard oral arguments from the parties.[2] Goetz argued the Act was unconstitutional because it (1) was beyond Congress' power to regulate interstate commerce, (2) imposed an

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[1] In their brief, the intervenors/appellees adopted the arguments made by the Secretary and addressed Goetz' first amendment challenge arguing the Act is not subject to first amendment scrutiny because it is government speech.

[2] The National Pork Producers Council, the American Soybean Association and the National Potato Council filed amicus briefs in the district court.

unconstitutional direct tax, (3) effected an impermissible delegation of legislative authority, (4) violated the Takings Clause of the Fifth Amendment, (5) violated the Equal Protection Clause of the Fourteenth Amendment, and (6) infringed on the first amendment rights of cattle producers. He sought a ruling in the district court that the Act is unconstitutional, an injunction against its enforcement, and a refund of assessments he has paid.

On Feb. 28, 1996, the district court upheld the constitutionality of the Act adopting the reasoning of the Third Circuit Court of Appeals in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).[3] The district court found that promoting the beef industry is a proper object of legislation under Congress' commerce power because it is reasonably adapted to the goal of strengthening the beef industry. 920 F. Supp. at 1180. The district court also held that the assessment imposed by the Beef Promotion Act is not a tax because the Act does not raise revenue for the government and regulation is the primary purpose of the statute. *See id.* at 1181. The court further held that Congress did not unlawfully delegate its legislative authority to the members of the beef industry because the Act places the Board under the Secretary's authority, Congress sets the amount of the assessments, and the Secretary decides how the funds will be spent. *See id.* at 1182. As to Goetz' takings clause claim, the district court concluded there was no fifth amendment violation because the government is not taking money for private use or to confer a private benefit

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[3] The plaintiff in *Frame* also challenged the constitutionality of the Beef Promotion Act.

on private interests (beef groups) in the beef industry. *See id.* Since Congress has determined beef promotion is in the public interest, the district court held courts should not substitute their judgment for Congress'. *See id.*

With regards to Goetz' first amendment claim, the district court agreed with the *Frame* court and found there was no free speech or free association violation because the Act is "commercial speech" not "government speech."[4] The district court concluded that the Act passed the test outlined in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980) on the free speech claim.[5] The court also concluded Goetz' first amendment free association claim should be analyzed under the higher standard of scrutiny set forth in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).[6] 920 F. Supp. at 1182. The district court found the Act's restrictions passed this test because there was only a slight incursion on Goetz' associational rights, the national interest was compelling, the purpose of trying to bolster the beef image was neutral, the Act did not proscribe any official

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[4] The district court, like the court in *Frame*, recognized the issue was a close one. *See id.* at 1182.

[5] Restrictions on commercial speech are subject to the test outlined in *Central Hudson*: (1) the State must assert a substantial government interest; (2) the regulatory technique must be in proportion to that interest; and (3) the incursion on commercial speech be designed carefully to achieve the State's goal. 447 U.S. at 564.

[6] Under *Roberts*, the governmental interference with associational rights must be justified by "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." 468 U.S. at 623.

view, and no political funding was authorized by the statute. *See id.* at 1183.

Finally, the district court found there was no equal protection violation. The court held that Congress had a rational basis for enactment of the statute. Specifically, the district court determined that an assessment was easier to administer, ranchers would be the most benefitted by the Act and ranchers could pass any costs incurred on to others, and since Congress gave cattle producers the maximum influence in shaping the program, it rationally decided to pass along the corresponding financial burden to them.[7] *See id.*

The district court (1) granted the motion to dismiss filed by the Secretary and intervenors; (2) denied Goetz' motion for summary judgment; (3) declared Goetz' motion for class certification moot; and (4) set aside its prior orders staying the administrative proceedings. *See id.* at 1184. Goetz appeals the district court's decision and asks this court to declare the Act unconstitutional, give him injunctive relief from the administrative proceedings, and order the return of funds he and other class members paid as assessments under the Beef Promotion Act.

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[7] The district court also held that because no fundamental right was involved the Equal Protection Clause only required that the classification rationally further legitimate governmental interests. *See id.* at 1183 (citing *Nordlinger v. Hahn*, 505 U.S. 1, 8-12, 112 S.Ct. 2326, 2331-32, 120 L.Ed.2d 1 (1992); *United States v. Phelps*, 17 F.3d 1334, 1344 (10th Cir.), *cert. denied*, 513 U.S. 844, 115 S.Ct. 135, 130 L.Ed.2d 77 (1994); *O'Connor v. City and County of Denver*, 894 F.2d 1210, 1223 (10th Cir.1990)).

On July 9, 1997, we directed the parties to file supplemental briefs addressing the effect of the Supreme Court's decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S.Ct. 2130 (1997) on Goetz' first amendment claim. In *Wileman Bros.*, the Supreme Court, resolving a circuit split, held the regulations imposing a generic advertising program for California peaches, nectarines, and plums paid for by mandatory assessments on fruit handlers, did not implicate or violate the First Amendment.

Analysis

In this appeal, Goetz raises all of the same claims made in the district court except the unconstitutional delegation of power and taking clause claims. The ruling of the district court is reviewed *de novo*. *National Commodity & Barter Ass'n v. Gibbs*, 886 F.2d 1240, 1243-44 (10th Cir. 1989) (legal issues are reviewed *de novo*).

Commerce Clause

Goetz first argues the Beef Promotion Act is unconstitutional because it violates the Commerce Clause. He contends (1) the Act does not have a public purpose, (2) the Act does not regulate an activity which substantially affects interstate commerce, and (3) there is no rational connection between the regulatory means selected and the asserted ends. In response, the Secretary argues beef purchases and sales substantially affect interstate commerce. Furthermore, the Secretary argues, the Act, which authorizes promotion and research to strengthen the beef

industry and is funded by a regulatory assessment, represents a valid exercise of Congress' commerce power. In addition, the regulation of interstate commerce encompasses promotion as well as prohibition. The Secretary contends promotion and research are reasonably adapted to the Act's goal of strengthening the market through increased consumption because advertising affects demand.

The United States Supreme Court has clearly defined a court's function in examining Congress' exercise of its power under the Commerce Clause:

> The task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding. This established, the only remaining question for judicial inquiry is whether the means chosen by [Congress] is reasonably adapted to the end permitted by the Constitution. The judicial task is at an end once the court determines that Congress acted rationally in adopting a particular regulatory scheme. Judicial review in this area is influenced above all by the fact that the Commerce Clause is a grant of plenary authority to Congress. This power is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. Moreover, this Court has made clear that the commerce power extends not only to the use of channels of interstate or foreign commerce and to protection of the instrumentalities of interstate commerce or persons or things in

> commerce, but also to activities affecting commerce. As we explained in *Fry v. United States*, 421 U.S. 542, 547, 95 S.Ct. 1792, 1795, 44 L.Ed.2d 363 (1975), even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations. Thus, when Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational.

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) (internal citations and quotations omitted). *See also State of Oklahoma v. Federal Energy Regulatory Commission*, 661 F.2d 832, 837 (10th Cir. 1981), *cert. denied, Texas v. Federal Energy Regulatory Commission*, 457 U.S. 1105 (1982); *United States v. Hampshire*, 95 F.3d 999, 1001-1002 (10th Cir. 1996), *cert. denied*, 117 S.Ct. 753 (1997).

In examining the validity of Congress' exercise of power, we begin with the language contained in the Act itself. Congress made the following findings when it passed the Beef Promotion Act:

> (1) beef and beef products are basic foods that are a valuable part of human diet;
>
> (2) the production of beef and beef products plays a significant role in the Nation's economy, beef and beef products are produced by thousands of beef producers and processed by numerous processing entities, and beef and beef products are consumed by millions of people throughout the United States and foreign countries;

> (3) beef and beef products should be readily available and marketed efficiently to ensure that the people of the United States receive adequate nourishment;
>
> (4) the maintenance and expansion of existing markets for beef and beef products are vital to the welfare of beef producers and those concerned with marketing, using, and producing beef products, as well as to the general economy of the Nation;
>
> (5) there exist established State and national organizations conducting beef promotion, research, and consumer education programs that are invaluable to the efforts of promoting the consumption of beef and beef products; and
>
> (6) beef and beef products move in interstate and foreign commerce, and beef and beef products that do not move in such channels of commerce directly burden or affect interstate commerce of beef and beef products.

7 U.S.C. § 2901(a).

Congress' purpose and objectives are clearly set forth in the Act:

> It, therefore, is declared to be the policy of Congress that it is in the public interest to authorize the establishment, through the exercise of the powers provided herein, of an orderly procedure for financing (through assessments on all cattle sold in the United States and on cattle, beef, and beef products imported into the United States) and carrying out a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and

> expand domestic and foreign markets and uses for beef and beef products. Nothing in this Act shall be construed to limit the right of individual producers to raise cattle.

7 U.S.C. § 2901(b).

Goetz first contends that beef production does not substantially affect interstate commerce.[8] For congressional exercise of power to be valid under the commerce clause, the legislation must involve an activity that substantially affects interstate commerce. *United States v. Lopez*, 115 S.Ct. 1624, 1630 (1995) (Court struck down the Gun Free School Zone Act of 1990 enacted under the commerce clause because it had nothing to do with any sort of economic enterprise). As the district court noted, "It should be beyond dispute that beef moves in and substantially affects interstate commerce, thus making the beef industry a proper object of legislation under the commerce clause." 920 F. Supp. at 1179. We also conclude Congress had a rational basis for finding the beef industry substantially affects interstate commerce.

Goetz also argues Congress really intended to regulate advertising. However, the plain language of the statute reveals the purpose of the Act is to strengthen the beef industry and we conclude this is a legitimate congressional goal. We further conclude the objective of the

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[8] Goetz contends the Act is unconstitutional because it does not have a public purpose. Essentially, he argues the Act's primary purpose is to raise revenue, therefore it is a direct tax impermissibly levied upon him. *See* Brief of Appellant at 31. As set forth below, we hold the Act's primary purpose is to regulate, therefore it is not a tax.

Act is valid and the stimulation of the beef market is a proper regulatory activity.

Goetz contends Congress' commerce power is limited to restricting or prohibiting an activity.[9] We agree with the well reasoned opinion of our sister circuit in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990). The Third Circuit said, "[I]t is now indisputable that the power to regulate interstate commerce includes the power to promote interstate commerce." *Id.* at 1126. The Act regulates commerce by authorizing the collection of an assessment that is used to promote and advertise beef. The Supreme Court has recognized that advertising stimulates consumer demand for the product being promoted. *See Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328, 343 (1986). The court in *Frame* also rejected the argument that the Act is not regulatory noting that Congress chose to promote and stimulate the demand side of the beef market indirectly, by influencing consumer attitudes toward beef. 885 F.2d at 1126. The *Frame* court likewise rejected Goetz' argument that the Act is unconstitutional because no activity is being regulated. The court stated: "[W]e decline to invalidate an otherwise lawful exercise of the commerce power on the basis Congress has not specified whether it is regulating the 'activity' of 'consumer beef purchases,' 'interstate beef sales,' or 'national beef markets.' Each

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[9] Goetz contends Congress does not have the power to "stimulate and promote" commerce since Congress' power is limited to a) leaving the activity alone; b) restricting the activity; or c) prohibiting the activity.

activity is related, and is validly regulated by Congress." *Id.* at 1127.

Goetz also contends there is no rational connection between the regulatory means selected and the asserted end. Goetz contends since the government has set up a pork promotion and research board (among others), and pork is the primary competitor of beef, it is not reasonable for the Secretary to engage in conflicting programs. In addition, Goetz argues the Act does not serve its stated purpose to regulate beef and Congress is actually trying to regulate advertising.

In considering this argument, the *Frame* court stated: "To stimulate the demand for beef, the lack of which Congress has determined is harming the beef industry, Congress has chosen from its arsenal of regulatory means promotion and advertising, research, consumer information and industry information. These endeavors are rationally related to the maintenance and expansion of the nation's beef markets." *Id.* The *Frame* court found that the Act was a valid exercise of Congress' power to regulate interstate commerce. *See id.* We agree. Goetz' argument that the promotion of beef is offset by other promotion schemes such as for pork is without merit. We hold Congress has a rational basis for stimulating different areas of the agricultural economy and determining its various promotional programs are in the best interest of the public.

In sum, we conclude that under current Supreme Court precedent, Congress has validly exercised its commerce powers in enacting the Beef Promotion Act.

Direct Tax

Goetz also argues the assessment is a direct tax that must be apportioned uniformly among the states to be constitutional under the Taxing Clause because the Act's primary purpose is to raise revenue. Goetz argues the Act is a direct tax and relies on legislative history to support his contention Congress never intended it to be a regulatory program. Goetz contends the assessments flow to qualified beef councils and national private trade associations in the beef industry.

The Secretary argues the Apportionment Clause is inappropriate because Congress clearly intended to exercise its authority under the Commerce Clause. The Secretary contends assessment is not the objective of the Act but merely a funding mechanism for the promotion of the beef industry and research. The Secretary further argues the assessment is not a tax but is like a "special assessment" imposed on convicted criminals under the Victims of Crimes Act, or mandatory bar dues or union dues. Finally, the Secretary points out that Goetz has no evidence that the assessment is a direct tax.

The test for determining whether an assessment is a tax has been clearly enunciated by the Sixth Circuit Court of Appeals:

> The test to be applied is to view the objects and purposes of the statute as a whole and if from such examination it is concluded that revenue is the primary purpose and regulation merely incidental, the imposition is a tax and is controlled by the taxing provisions of the Constitution. Conversely, if regulation is the primary purpose of the statute, the mere fact that incidentally

> revenue is also obtained does not make the imposition a tax, but a sanction imposed for the purpose of making effective the congressional enactment.

Rodgers v. United States, 138 F.2d 992, 994 (6th Cir. 1943). *See also Chickasaw Nation v. State of Oklahoma ex rel Oklahoma Tax Commission*, 31 F.3d 964, 968 (10th Cir. 1994) (quoting *American Petrofina Co. of Texas v. Nance*, 859 F.2d 840, 841 (10th Cir. 1988) ("[t]he mere fact a statute raises revenue does not imprint upon it the characteristics of a law by which the taxing power is exercised.")). We agree with the district court that the primary purpose of the Act is regulation, not to raise revenues.

First Amendment

Goetz also asserts the assessment violates his First Amendment right because he is compelled to support advertising which promotes beef consumption.[10] Goetz argues the Act singles out and unfairly burdens producers, importers and persons who must collect the tax (buyers of beef).

The Secretary responds that the Act does not suppress or restrict Goetz' speech, it merely requires he pay an assessment to fund the promotion of a commodity that he markets and is no different than compelled funding of

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[10] The $1.00 per head assessment on the sale and importation of cattle funds the Operating Committee's activities, which include the promotion of the beef industry throughout the country through "generic advertising." The generic advertisements include the familiar "Beef, it's what's for dinner" promotion.

unions or integrated bars. Furthermore, the Secretary and intervenors argue the Act is "government speech" (as opposed to commercial speech) and there are no First Amendment restrictions on "government speech."

This Court agrees with the Secretary and intervenors. *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S.Ct. 2130 (1997), involved a First Amendment challenge to a generic advertising program for California peaches, nectarines, and plums which was established pursuant to a marketing order promulgated by the Secretary of Agriculture and supported by mandatory assessments imposed on the handlers of fruit. The Supreme Court granted certiorari to resolve the conflict between the *Ninth Circuit in Glickman v. Wileman Brothers & Elliott, Inc.*, 58 F.3d 1367 (1995), which held the peach promotion program violated the First Amendment, and the Third Circuit in *Frame*, which held the Beef Promotion Act did not violate the First Amendment.

In *Wileman Bros.* the Supreme Court held that the generic marketing program did not raise a First Amendment issue for the Court because the marketing order did not impose restraint on the freedom of any producer to communicate any message to any audience, did not compel any person to engage in any actual or symbolic speech, and did not compel the producers to endorse or to finance any political or ideological views. *See id.* at 2138. The Supreme Court found its compelled speech cases inapplicable because there is no "compelled speech." The Court held the assessments for ads did not require the fruit producers to repeat objectionable messages, use their property to convey antagonistic ideological messages, force them to respond to a hostile message

when they prefer to remain silent or require them to be publicly identified or associated with another's message. *See id.* at 2139. Furthermore, the Court said, the assessments are financial contributions for generic advertising that program participants do not disagree with, and the advertising is not attributed to individual handlers. *See id.* In addition, none of the generic ads promote any particular message other than encouraging consumers to buy California tree fruit. *See id.*

The Court concluded that the generic ads for California fruit are germane to the purposes of the marketing orders and the assessment is not used for ideological activities. *See id.* at 2140. The Court further concluded that generic advertising is a species of economic regulation that should enjoy the same strong presumption of validity that the Court accords other policy judgments made by Congress. *See id.* at 2141. Finding the generic advertisements do not warrant special First Amendment scrutiny under the *Central Hudson* standard, the Supreme Court reversed the Ninth Circuit decision. *See id.* at 2142.

In the case at bar, the district court incorrectly concluded that the Act was commercial speech and applied *Central Hudson*. The district court found the Act passed the *Central Hudson* test and did not violate Goetz' freedom of speech and association. *Goetz v. Glickman*, 920 F. Supp. at 1182-83. We find the district court erred in applying the *Central Hudson* test to Goetz' First Amendment claim. However, we can affirm the district court on a basis not relied on by the court if supported by record and law. *United States v. Corral*, 970 F.2d 719, 726 n.5 (10th Cir. 1992). Therefore, we affirm the district court and find under the Supreme Court's decision in *Wileman Bros.*, Goetz' First Amendment claim is fruitless.

Equal Protection

Finally, Goetz contends the assessment violates the Equal Protection Clause because it infringes on his First and Fifth amendment rights. Therefore, he argues, the Act must be reviewed under strict scrutiny to determine whether the statute is narrowly tailored to further a compelling governmental interest. Goetz argues the Act unfairly burdens producers, importers and collecting persons while benefitting the entire beef industry. Goetz also contends Congress' interests in preserving the American cattlemen's traditional way of life and avoiding the free rider problem are not compelling or substantial governmental interests. Goetz further argues the refund provisions of the Act suggest the government's interest is not compelling or substantial. Goetz contends there are numerous less restrictive means available to Congress as evidenced by the legislative discussions.[11]

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[11] Goetz contends his fundamental rights under the First and Fifth Amendments have been infringed and therefore strict scrutiny applies. In addition, Goetz contends that the Beef Promotion Act is presumed to be unconstitutional for the purposes of analysis of his First and Fifth Amendment claims. However, we conclude Goetz' claims must be analyzed under the rational basis test and the Act, therefore, is presumptively constitutional and the burden falls on Goetz to show that the Act is irrational or arbitrary and cannot further a legitimate governmental interest. *See United States v. Phelps*, 17 F.3d 1334, 1345 (10th Cir.), *cert. denied*, 115 S.Ct. 135 (1994). In his appellate brief, Goetz fails to address his equal protection claim under the rational basis test, arguing only the strict scrutiny standard of review.

In response, the Secretary argues the failure of Goetz' First Amendment claim dooms his equal protection challenge as well. Since he does not allege a suspect class, the Secretary contends the strict scrutiny standard of review does not apply. Furthermore, the Act does not infringe on Goetz' equal protection rights because it makes an economic distinction and need only be rationally related to a legitimate governmental interest. The Secretary argues the Act easily survives the rational basis test because Congress has a compelling interest in strengthening the beef industry. In addition, the Secretary argues, Congress also rationally decided the members of the industry that have the most to gain should bear the economic costs involved.

The Fifth Amendment's Equal Protection Clause prohibits the federal government from discriminating between individuals or groups. Government classification that actually jeopardizes the exercise of a fundamental right or a suspect class (race, gender, etc.) must be reviewed under a strict scrutiny standard and must be precisely tailored to further a compelling governmental interest. *Edwards v. Valdez*, 789 F.2d 1477, 1483 (10th Cir. 1986). If no suspect class or fundamental right is involved, the Equal Protection Clause only requires that the classification rationally further a legitimate governmental interest. *See Nordlinger v. Hahn*, 505 U.S. 1 (1992); *O'Connor v. City and County of Denver*, 894 F.2d 1210, 1223-24 (10th Cir. 1990).

We agree with the district court's determination that the Act does not violate Goetz' First and Fifth Amendment rights, and the strict scrutiny standard of review does not apply. Although Goetz failed to address his

equal protection claims under the rational basis test, the court in *Frame* identified several rational bases for Congress' enactment of the statute: (1) an assessment on the initial sale of cattle is easier to administer; (2) ranchers would be most benefitted by the Act; and (3) ranchers could pass the cost on to others. *Frame*, 885 F.2d at 1137-38. This Court finds the Act easily survives Goetz' equal protection challenge as well.

Conclusion

The judgment of the district court is AFFIRMED in all respects on Goetz' Commerce Clause, Taxing Clause and Equal Protection Clause claims. The district court's decision is AFFIRMED on Goetz' first amendment claims under the reasoning of the Supreme Court in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S.Ct. 2130 (1997).

APPENDIX B

CITATION:

Goetz v. Glickman, 920 F.Supp. 1173 (D.Kan. 1996), *aff'd*, 149 F.3d 1131 (10th Cir. 1998).

Jerry GOETZ d/b/a Jerry Goetz and Sons, individually and on behalf of all others similarly situated, Plaintiff,

v.

Dan GLICKMAN, Secretary, United States Department of Agriculture, Defendant.

Civil Action No. 94-1299-FGT

United States District Court,
D. Kansas.

Feb. 28, 1996.

Clarence L. King, Jr., David Klaassen, Brian Wilson Wood, Hampton, Royce, Engleman & Nelson, Salina, KS, for Jerry Goetz.

Stephen K. Lester, Randall K. Rathbun, Office of United States Attorney, Wichita, KS, Thomas W. Millet, Frank W. Hunger, U.S. Department of Justice, Civil Division, Washington, DC, Felicia L. Chambers, U.S. Department of Justice, Washington, DC, for U.S. by and on behalf of its agency, U.S. Dept. of Agriculture, Secretary of Agriculture, Dan Glickman.

Brian E. Gardner, Morrison & Hecker, L.L.P., Kansas City, MO, for National Pork Producers and National Pork Producers Council amicus.

James A. Walker, Rachael K. Pirner, Triplett, Woolf & Garretson, Wichita, KS, James D. Keast, Carmody, MacDonald, Hilton, Wolf & Keast, P.C., St. Louis, MO, for American Soybean Ass'n amicus.

James A. Riedy, McDermott, Will & Emery, McDermott, Will & Emery, Washington, DC, for National Potato Council amicus.

Dennis L. Gillen, Depew and Gillen, L.L.C., Wichita, KS, John G. Roberts, Jr., Hogan & Hartson, L.L.P., Washington, DC, Richard T. Rossier, Marc E. Miller, McLeod, Watkinson & Miller, Washington, DC, for Willie Reibel, Rodney Mense, Larry Mense, Jan Lyons, Kansas Livestock Association, National Cattlemen's Association and National Live Stock and Meat Board.

MEMORANDUM AND ORDER

THEIS, District Judge.

The plaintiff Jerry Goetz d/b/a Jerry Goetz and Sons (hereinafter Goetz or plaintiff) brought this action challenging the constitutionality of the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901 et seq. The plaintiff seeks to represent a class of all persons subject to the requirements of the Beef Promotion and Research Act of 1985, including all persons who have been required to pay the assessment of one dollar per head of cattle sold, as required by the Act. Also appearing in this case are intervenors Willie Reibel, Rodney Mense, Larry Mense, Jan Lyons, who are Kansas cattle ranchers, and Kansas Livestock Association, National Cattlemen's Association,

and National Live Stock and Meat Board, three nonprofit beef industry groups.

Presently pending before the court are: (1) the defendant Secretary of Agriculture's motion to dismiss, Doc. 29, (2) the defendant's motion to dismiss the first amended complaint, Doc. 112, (3) plaintiff's motion for summary judgment, Doc. 73, (4) plaintiff's motion for summary judgment on the first amended complaint, Doc. 118, (5) intervenors' motion to dismiss the complaint, Doc. 101, (6) intervenors' motion to dismiss the first amended complaint, Doc. 110, and (7) plaintiff's renewed motion for summary judgment, Doc. 131. The court has considered the briefs, heard oral argument on these matters, and is prepared to rule. For the reasons discussed in this opinion, the defendant's and intervenors' motions to dismiss shall be granted.

Other pending motions which were not argued at the hearing include: (1) plaintiff's motion for class certification, Doc. 22, and (2) defendant's motion for reconsideration of preliminary injunction orders, Doc. 32. Given the court's resolution of the motions to dismiss and for summary judgment, the remaining motions do not need to be addressed.

The Beef Promotion Act directs the Secretary of Agriculture to promulgate a Beef Promotion and Research Order ("the Order"), that provides for financing beef promotion and research through assessments on cattle sold in the United States and cattle, beef, and beef products imported into the United States. 7 U.S.C. § 2901(b),

2903, 2904(8)(A)-(C). The Order established by the Secretary (7 C.F.R. Part 1260, Subpart A) established the Cattlemen's Beef Promotion and Research Board ("the Cattlemen's Beef Board") and the Beef Promotion Operating Committee ("the Operating Committee"). 7 U.S.C. § 2904(1)-(7); 7 C.F.R. 1260.141, 1260.161. The Cattlemen's Beef Board is made of cattle producers and importers appointed by the Secretary. 7 U.S.C. § 2904(1); 7 C.F.R. 1260.141. The Board's principal duties are to administer the Order, make rules and regulations to effectuate the terms and provisions of the Order, elect members of the Board to serve on the Operating Committee, to approve or disapprove the budgets submitted by the Operating Committee, to receive, investigate and report to the Secretary complaints of violations of the Order, and the [sic] recommend to the Secretary amendments to the Order. 7 U.S.C. § 2904(2)(A)-(F).

The Operating Committee is composed of ten members of the Cattlemen's Beef Board and ten members elected by a federation of State beef councils. 7 U.S.C. § 2904(4)(A); 7 C.F.R. 1260.161. The Operating Committee develops and submits to the Secretary for approval promotion, advertising, research, consumer information and industry information plans and projects. 7 U.S.C. § 2904(4)(B); 7 C.F.R. 1260.168. The Act prohibits the use of funds for political purposes. 7 U.S.C. § 2904(10).

The Act requires cattle producers in the United States to pay a one dollar per head assessment on cattle sold in this country. 7 U.S.C. § 2904(8)(A) & (C); 7 C.F.R. 1260.172(a)(1), 1260.310. Each person making payment to a cattle producers [sic] for cattle is a "collecting person" who is required to collect the assessments and remit them

to a qualified State beef council in the State in which the collecting person resides, or, if there is no qualified State beef council, to the Cattlemen's Beef Board. 7 U.S.C. § 2904(8)(A); 7 C.F.R. 1260.311(a), 1260.312(c). Each collecting person must report to the Board certain information for each calendar month at the time the assessments are remitted and must maintain and make available for the Secretary's inspection the records necessary to verify the reports. 7 U.S.C. § 2904(11); 7 C.F.R. 1260.201, 1260.312(a)-(c), 1260.202.

The Secretary is authorized to conduct investigations and to issue subpoenas to determine if there has been a violation of the Act, the Order, or the rules and regulations thereunder. 7 U.S.C. § 2909. After an administrative hearing, the Secretary may issue an order restraining violations and may impose a civil penalty of up to $5,000 for each violation of the Act and the Order. *Id.* § 2908(a). In addition, the Secretary may request the Attorney General to initiate a civil action to enforce, and to restrain a person from violating, any order or regulation under the Act. *Id.* § 2908(b), (c).

Within 22 months of the issuance of the Order, the Act required the Secretary to conduct a referendum among those persons who were producers and importers during that trial period. The Order would continue to operate only upon approval by a majority of those participating in the referendum. 7 U.S.C. § 2906(a). Prior to the referendum, a cattle producer who paid the assessment could demand a one-time refund. *Id.* § 2907; 7 C.F.R.

1260.173, 1260.174. On May 10, 1988, the referendum was conducted and the Order was approved.[1]

Plaintiff is a "producer" within the meaning of the Act. 7 U.S.C. § 2902(12). As a producer, plaintiff is subject to the one dollar per head assessment upon the sale of cattle. Plaintiff alleges that at times he makes payments to other producers for cattle purchased from such producers, and thus he is a "collecting person" under the Act. *Id.* § 2904(8)(A). As a collecting person, plaintiff is subject to the collecting provisions of the Act and accompanying regulations.

On or about October 29, 1993, the Secretary commenced an administrative proceeding to enforce the provisions of the Act against plaintiff. The Administrative Judge scheduled a hearing for August 8, 1994. On August 2, 1994, simultaneously with filing his civil action, the plaintiff filed a motion for a temporary restraining order to enjoin the Secretary from proceeding with the administrative hearing. The court entered a temporary restraining order which expired on August 15, 1994. On August 19, 1994, the parties agreed, with the court's approval, to stay the administrative proceedings until October 1, 1994. As a part of this agreement, plaintiff consented to providing all pertinent records to an accounting firm that was conducting an audit on defendant's behalf. The stay of

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[1] The statute authorizes the Secretary to conduct an additional referendum on the request of 10% or more of cattle producers to determine whether cattle producers favor the termination of the Order. 7 U.S.C. § 2906(b). According to the statements made at oral argument, that option, while still available, has never been exercised.

administrative proceedings has since been continued by the court over the defendant's objection.

Plaintiff alleges that he has no desire to associate with the Secretary, the Cattlemen's Beef Board, the Operating Committee, or any State beef council in any matters related to the Beef Promotion Act. Plaintiff further asserts that he has no desire to participate in or financially support any advertising campaign or promotional endeavor undertaken by any of these persons or entities. In his complaint, plaintiff prayed for a temporary restraining order and preliminary injunction staying the administrative proceedings brought by the Secretary against him. The other counts pleaded in the amended complaint assert that the Act is unconstitutional under the following theories: lack of constitutional authority under commerce clause and taxing powers, and unconstitutional delegation of legislative authority; violation of equal protection rights; taking for a non-public use without just compensation; violation of right to free association; violation of right to free speech; violation of right of freedom of belief and freedom of conscience. Plaintiff seeks a ruling that the Act is unconstitutional, an injunction against enforcement, and a refund of any unspent monies.

The defendant argues that the Act does not violate any of plaintiff's constitutional rights. The defendant relies primarily on *United States v. Frame*, 885 F.2d 1119 (3d Cir.1989), *cert. denied*, 493 U.S. 1094, 110 S.Ct. 1168, 107 L.Ed.2d 1070 (1990), in which the Third Circuit rejected a virtually identical challenge to the Act. This court finds the *Frame* decision persuasive and will follow it, as discussed below.

I. Commerce Powers

The plaintiff concedes that Congress purported to rely on its commerce powers in enacting the Beef Promotion Act. Plaintiff argues that the activity being regulated does not substantially affect interstate commerce. Plaintiff further argues that the Beef Promotion Act is not regulatory because Congress does not have the power to "stimulate and promote" commerce. Plaintiff asserts that the power granted to Congress to regulate commerce is limited to (1) leaving the activity alone; (2) restricting the activity; or (3) prohibiting the activity.

Plaintiff next argues that there is no rational connection between the regulatory means selected and the asserted ends. Other commodity groups have sought and received similar assistance from the government. The government has set up a pork promotion and research board (*see* Pork Promotion, Research, and Consumer Information Act of 1985, 7 U.S.C. § 4801 et seq.) which performs similar functions and funds comparable advertisements. Plaintiff argues that pork is the primary competitor of beef in the marketplace. Plaintiff asserts that it is not reasonable for the Secretary to engage in such conflicting programs.

There are three broad categories of activity that Congress may regulate under its commerce power: (1) the use of the channels of interstate commerce; (2) the protection of the instrumentalities of interstate commerce or persons or things in interstate commerce; and (3) the regulation of those activities having a substantial relation to interstate commerce (those activities that substantially affect interstate commerce). *United States v. Lopez*, 514 U.S. 549, ___ –

___, 115 S.Ct. 1624, 1629-30, 131 L.Ed.2d 626 (1995). While the defendant argues that the Act may be upheld under both the second and third categories noted above, this court intends to focus solely on the third category.

An act of Congress which adjusts the burdens and benefits of economic life comes to the court with a presumption of constitutionality. *Hodel v. Indiana*, 452 U.S. 314, 323, 101 S.Ct. 2376, 2382-83, 69 L.Ed.2d 40 (1981). A court may invalidate a statute enacted under the commerce clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce; or that there is no reasonable connection between the regulatory means selected and the asserted ends. *Id.* at 323-24, 101 S.Ct. at 2382-83.

When asked to determine whether a particular exercise of congressional power is valid under the commerce clause, the court's task is narrow. The court must defer to a congressional finding that the regulated activity affects interstate commerce if there is any rational basis for such a finding. Once this is established, the only remaining inquiry is whether the means chosen by Congress are reasonably adapted to the end permitted by the constitution. *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 276, 101 S.Ct. 2352, 2360, 69 L.Ed.2d 1 (1981); *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 17, 110 S.Ct. 914, 924-25, 108 L.Ed.2d 1 (1990).

When Congress passed the Beef Promotion Act, it made the following findings:

> (1) beef and beef products are basic foods that are a valuable part of human diet;

> (2) the production of beef and beef products plays a significant role in the Nation's economy, beef and beef products are produced by thousands of beef producers and processed by numerous processing entities, and beef and beef products are consumed by millions of people throughout the United States and foreign countries;
>
> (3) beef and beef products should be readily available and marketed efficiently to ensure that the people of the United States receive adequate nourishment;
>
> (4) the maintenance and expansion of existing markets for beef and beef products are vital to the welfare of beef producers and those concerned with marketing, using, and producing beef products, as well as to the general economy of the Nation;
>
> (5) there exist established State and national organizations conducting beef promotion, research, and consumer education programs that are invaluable to the efforts of promoting the consumption of beef and beef products; and
>
> (6) beef and beef products move in interstate and foreign commerce, and beef and beef products that do not move in such channels of commerce directly burden or affect interstate commerce of beef and beef products.

7 U.S.C. § 2901(a).

Congress declared the following purpose and objectives in the Beef Promotion Act:

> It, therefore, is declared to be the policy of Congress that it is in the public interest to authorize the establishment, through the exercise of the

> powers provided herein, of an orderly procedure for financing (through assessments on all cattle sold in the United States and on cattle, beef, and beef products imported into the United States) and carrying out a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products. Nothing in this Act shall be construed to limit the right of individual producers to raise cattle.

7 U.S.C. § 2901(b).

Plaintiff argues that Congress was intending to regulate advertising in the Act. Plaintiff ignores the language of the statute, which provided that the purpose of the Act was to strengthen the beef industry, not to regulate the advertising industry. The objectives contained in the Act are valid. The stimulation of trade in a particular industry is a proper regulatory activity. It was a legitimate goal for Congress to seek to strengthen the beef industry.

Plaintiff ignores reality by taking the position that the production of beef does not substantially affect interstate commerce. Plaintiff ignores the fact that beef and beef products move in interstate commerce. It should be beyond dispute that beef moves in and substantially affects interstate commerce, thus making the beef industry a proper object of legislation under the commerce clause. Congress had a rational basis for finding that the beef industry substantially affects interstate commerce.

This court rejects the plaintiff's argument that the commerce power is limited to restricting or prohibiting

an activity. As the Third Circuit noted in *United States v. Frame*, 885 F.2d at 1126, "it is now indisputable that the power to regulate interstate commerce includes the power to promote interstate commerce." The Beef Promotion Act regulates interstate commerce in beef through the imposition of a monetary assessment. The collected assessments are spent on beef promotion and advertising. Advertising stimulates consumer demand for the product being promoted. *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328, 343, 106 S.Ct. 2968, 2977-78, 92 L.Ed.2d 266 (1986). The promotion of beef represents a valid exercise of Congress' broad power to stimulate commerce. *United States v. Frame*, 885 F.2d at 1125.

The *Frame* decision also rejected the argument that the Act was not a "regulatory" program. The Third Circuit found that Congress established the Act to "strengthen and expand" the nation's beef markets. *Id.* The court noted Congress has in the past regulated commerce by influencing the supply side of agricultural markets (through quotas, loans and subsidies) as well as the demand side (through direct government purchases). In passing the Beef Promotion Act, Congress chose to promote and stimulate the demand side of the market indirectly, by influencing consumer attitudes towards beef. *Id.* at 1126. As noted in *Frame*, the legal definition of "regulate," rather than a more restrictive definition from a standard dictionary of the English language, should be applied in this context. *Id.* at 1126 n. 5.

In *Frame*, the court likewise considered an argument that the Act is unconstitutional because no "activity" is

being regulated. In *Frame*, the defendant argued that Congress' failure to specify the particular activity being regulated was fatal. The court stated, "we decline to invalidate an otherwise lawful exercise of the commerce power on the basis Congress has not specified whether it is regulating the 'activity' of 'consumer beef purchases,' 'interstate beef sales,' or 'national beef markets.' Each activity is related, and is validly regulated by Congress." *Id.* at 1127.

Finally, the *Frame* court considered whether there was a rational connection between the regulatory means selected and the asserted ends. The court stated, "To stimulate the demand for beef, the lack of which Congress has determined is harming the beef industry, Congress has chose from its arsenal of regulatory means promotion and advertising, research, consumer information and industry information. These endeavors are rationally related to the maintenance and expansion of the nation's beef markets." *Id.* Accordingly, the court concluded that the Beef Promotion Act was a valid exercise of Congress' power to regulate interstate commerce. *Id.*

This court agrees with the reasoning and holding of the Third Circuit. The means selected by the Act are reasonably related to the congressional objectives. The Act sets up a system of promotion, advertising and research. These provisions are reasonably calculated to further the goal of strengthening the position of beef in the marketplace by stimulating consumer demand for beef and increasing sales of beef.

Plaintiff argues that the promotion of beef is offset by other promotion schemes, such as for pork. The court

finds it to be rational for Congress to seek to stimulate various sectors of the agricultural economy, including competitors of the beef industry. It would be rational for Congress to find that the stimulation of demand in all sectors of the agricultural economy would be in the public interest, benefiting the overall economy through increased domestic consumption and export of agricultural products. The court concludes that it is reasonable for Congress to promote more than one segment of the agriculture industry.

The court concludes that the Act is a valid exercise of the commerce power because it is reasonably adapted to the goal of strengthening the beef industry. It is not for this court to determine if Congress selected the best means for achieving its stated goal. That this court (or the plaintiff) could devise a regulatory scheme that is somehow "better" does not render the Beef Promotion Act unconstitutional. The Supreme Court's words in Preseault are instructive: "The process of legislating often involves tradeoffs, compromises, and imperfect solutions, and our ability to imagine ways of redesigning the statute to advance one of Congress' ends does not render it irrational." *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 19, 110 S.Ct. 914, 925, 108 L.Ed.2d 1 (1990).

The Supreme Court's recent case, *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), which struck down the Gun-Free School Zones Act of 1990 under the commerce clause, does not dictate a different analysis or result. While striking down the Gun-Free School Zones Act because it did not substantially affect interstate commerce, the Supreme Court reiterated the broad powers of Congress to regulate the use of the

channels of commerce, to regulate and protect the instrumentalities of commerce or persons or things in commerce, and to regulate those activities having a substantial relation to interstate commerce or substantially affecting interstate commerce.

In *Lopez*, the Court noted that it has upheld a wide variety of congressional acts regulating intrastate economic activity when the Court had concluded that the activity substantially affected interstate commerce. When economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained. *Lopez*, 514 U.S. at ___, 115 S.Ct. at 1630. After analyzing the Gun-Free School Zones Act, the Supreme Court concluded that it had nothing to do with any sort of economic enterprise. The Act could not be sustained as a regulation of a commercial transaction which substantially affect interstate commerce. *Id.* at ___ - ___, 115 S.Ct. at 1630-31.

The Court next turned to a consideration of whether the statute contained a jurisdictional element which would ensure that the firearm possession affected interstate commerce. The statute in question did not contain an express jurisdictional element which would limit the reach of the statute to those situations which have an explicit connection with or effect on interstate commerce. *Id.* at ___, 115 S.Ct. at 1631. The Court noted that as part of its evaluation of constitutionality under the commerce clause, the Court considers legislative findings regarding effect on interstate commerce. *Id.* However, Congress normally is not required to made [sic] formal findings as to the substantial burdens that an activity has on interstate

commerce. *Id.* The Court rejected the government's various arguments regarding the potential effects that firearm possession in a school zone would have on interstate commerce. *Id.* at ___ - ___, 115 S.Ct. at 1631-34.

As contemplated by the Supreme Court in *Lopez*, the present case involves a situation in which economic activity substantially affects interstate commerce. Additionally, Congress has provided a number of legislative findings in the Beef Promotion Act regarding the effect of the beef industry on interstate commerce.

II. Taxing Powers

The plaintiff next argues that the assessment is a direct tax which is invalid because it is not apportioned as required by the constitution. Plaintiff argues that the raising of revenue is the primary purpose of the statute. Plaintiff asserts that the district court in *Frame* found the assessment under the Act to be a tax. However, the district court assumed arguendo that the Act was an exercise of Congress' taxing powers in order to address the argument that Congress had unlawfully delegated its taxing powers to the Secretary of Agriculture. *United States v. Frame*, 658 F.Supp. 1476, 1479 (E.D.Pa.1987). This argument was not addressed by the Third Circuit in *Frame* because the issue was abandoned on appeal. 885 F.2d at 1125 n. 4.

A regulatory scheme will not constitute a tax unless the real purpose and effect of the statute and regulations promulgated thereunder is to raise revenues for the general support of the government. *Cities Service Co. v. Federal Energy Admin.*, 529 F.2d 1016, 1029 (Temp.Emer.

Ct.App.1975) (citing Head Money Cases (*Edye v. Robertson*), 112 U.S. 580, 595, 5 S.Ct. 247, 252, 28 L.Ed. 798 (1884)), *cert. denied*, 426 U.S. 947, 96 S.Ct. 3166, 49 L.Ed.2d 1184 (1976). The test is well-established:

> The test to be applied is to view the objects and purposes of the statute as a whole and if from such examination it is concluded that revenue is the primary purpose and regulation merely incidental, the imposition is a tax and is controlled by the taxing provisions of the Constitution. Conversely, if regulation is the primary purpose of the statute, the mere fact that incidentally revenue is also obtained does not make the imposition a tax, but a sanction imposed for the purpose of making effective the congressional enactment.

Cities Service Co., 529 F.2d at 1029 (quoting *Rodgers v. United States*, 138 F.2d 992, 994 (6th Cir.1943)); *see also Mulroy v. Block*, 569 F.Supp. 256, 261 (N.D.N.Y.1983), aff'd per curiam, 736 F.2d 56 (2d Cir.1984), *cert. denied*, 469 U.S. 1159, 105 S.Ct. 907, 83 L.Ed.2d 922 (1985).

The Beef Promotion Act does not raise revenue for the government. Regulation (in the form of promotion of the beef industry) is the primary purpose of the statute. The mere fact that money changes hands in the pursuit of this object does not render the scheme a tax.

III. Delegation of Legislative Authority

Plaintiff argues that Congress impermissibly delegated its legislative powers, including its taxing and spending powers, to the Secretary, the Cattlemen's Beef Board and the Operating Committee. A similar delegation

argument was rejected by the Third Circuit in *Frame*. The court rejects this argument for the same reasons set forth by the Third Circuit.

The Third Circuit rejected the contention that the Act unlawfully delegated legislative authority to the Secretary. Congress not only provided standards for administration of the Act, it set forth with specificity the terms of the Act's implementation. Congress set the amount of the assessment at $1.00 per head. 7 U.S.C. § 2904(8)(C). Congress set forth detailed procedures for the selection of the Cattlemen's Beef Board and the Operating Committee. 7 U.S.C. § 2904(4)(A). *See Frame*, 885 F.2d at 1128.

The Third Circuit likewise rejected the contention that the Act unlawfully delegated legislative authority to members of the beef industry. The Act and the Order place the Board under the Secretary's "pervasive surveillance and authority." *Id.* at 1129. The Board is appointed by the Secretary. 7 U.S.C. § 2904(1); 7 C.F.R. 1260.141(b). Members of the Board and the Operating Committee are subject to removal by the Secretary. 7 C.F.R. 1260.212. The Secretary must be given notice of all meetings and must approve all budgets and contracts. 7 U.S.C. § 2904(4)(C), 2904(6)(A)-(B); 7 C.F.R. 1260.150(f), (g) & (m), 1260.168(e) & (f), 1260.168(h). The Third Circuit concluded that the Board and the Committee serve an advisory and ministerial function. Congress has set the amount of the assessments and the Secretary ultimately decides how the funds will be spent. *See Frame*, 885 F.2d at 1128-29.

IV. Taking

Plaintiff claims that the Beef Promotion Act violates the fifth amendment's takings clause, specifically that the Act constitutes a taking for a non-public use without just compensation. Plaintiff claims that his property (money) has been taken from him to confer a private benefit on private interests within the beef industry.

The *Frame* court rejected the argument that the Act is an unconstitutional taking of property for a private purpose. The Third Circuit noted that the fifth amendment prohibits the government from taking property for private use, but found that the Beef Promotion Act "was clearly enacted for a public purpose." *Frame*, 885 F.2d at 1138. The determination of what constitutes a public use belongs initially to the legislature, and the court should not substitute its judgment for that of the legislature "unless the use be palpably without reasonable foundation." *Id.* (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241, 104 S.Ct. 2321, 2329, 81 L.Ed.2d 186 (1984)).

Congress believed the Beef Promotion Act was in the public interest. *See* 7 U.S.C. § 2901(b) (quoted supra). Because the beef industry plays a significant role in the national economy and because the success of that industry is vital to the national economy, 7 U.S.C. § 2901(a)(2) & (4), Congress found the promotion of beef to be in the public interest. 7 U.S.C. § 2901(b). The Third Circuit concluded that Congress had, at the very least, a reasonable basis for concluding that such legislation would be in the public interest. *Frame*, 885 F.2d at 1139.

The court will not second-guess the Congress' determination that stimulation of the beef industry is in the

public interest. Even if there was a taking, it was for a public use and the plaintiff receives just compensation in the form of the promotion and research aspects of the Act.

V. Freedom of Speech and Association

Plaintiff's First Amendment challenge encompasses both freedom of association and freedom of speech. The *Frame* decision rejected these arguments. Again, this court is persuaded by the Third Circuit's reasoning.

The defendant and intervenors argue that the speech at issue here is "government speech" and immune from First Amendment scrutiny. The *Frame* court found the issue to be close, but found it instead to be "commercial speech." 885 F.2d at 1130-1133. The court noted that the following three part test applies to restrictions on commercial speech: (1) the state must assert a substantial government interest; (2) the regulatory technique must be in proportion to that interest; (3) the incursion on commercial speech must be designed carefully to achieve the state's goal. *Id.* at 1133. However, the *Frame* court found that the free association claims triggered a higher standard of scrutiny than that applied in commercial speech cases: governmental interference with associational rights must be justified by "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 1134 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623, 104 S.Ct. 3244, 3252-53, 82 L.Ed.2d 462 (1984)).

The Third Circuit ruled that the Act would be constitutional only if the government could demonstrate that the Act was adopted to serve compelling state interests, that are ideologically neutral, and that cannot be achieved through means significantly less restrictive of free speech or associational freedoms. The court concluded that the importance of the governmental interest justified the slight incursion on associational and free speech rights. *Id.* The court found the national interest in maintaining and expanding beef markets to be compelling. *Id.* The purpose underlying the Act was found to be neutral. The government sought to bolster the image of beef solely to increase sales, not to prescribe any official view. *Id.* at 1135. Finally, the court found the infringement on first amendment rights to be slight. The Board is authorized to engage in commercial speech on behalf of beef producers, to promote the product the producers have chosen to market. The Board is prohibited from spending funds for political activity. The court concluded that the Act was drafted in a way that infringes on the contributors' rights no more than necessary to achieve the stated goal. *Id.* at 1135-37.

This court is persuaded by the Third Circuit's decision on the first amendment issues. Accordingly, the court rejects the plaintiff's arguments that the Act violates his freedom of speech and association.

VI. Equal Protection

As the *Frame* court noted, the fifth amendment contains an implicit equal protection component that prohibits the federal government from discriminating

between individuals or groups. "Unless the statute creates a suspect classification or impinges upon a constitutionally protected right, however, it need only be shown that the differential treatment bears 'some rational relationship to a legitimate state purpose.' " *Id.* at 1137 (quoting *City of Dallas v. Stanglin*, 490 U.S. 19, 23, 109 S.Ct. 1591, 1594, 104 L.Ed.2d 18 (1989)).

Plaintiff does not argue that the Act categorizes on the basis of an inherently suspect characteristic such as race. Plaintiff argues that the Act impinges upon his fundamental first and fifth amendment rights and, accordingly, the Act is to be reviewed under the strict scrutiny standard. However, unless a classification actually jeopardizes the exercise of a fundamental right, the equal protection clause requires only that the classification rationally further a legitimate governmental interest. *Nordlinger v. Hahn*, 505 U.S. 1, 8-12, 112 S.Ct. 2326, 2331-32, 120 L.Ed.2d 1 (1992); *United States v. Phelps*, 17 F.3d 1334, 1344 (10th Cir.), *cert. denied*, 513 U.S. 844, 115 S.Ct. 135, 130 L.Ed.2d 77 (1994); *O'Connor v. City and County of Denver*, 894 F.2d 1210, 1223-24 (10th Cir.1990). Since the court has already ruled that the legislative classification does not infringe the plaintiff's first and fifth amendment rights, the strict scrutiny standard of review does not apply.

Plaintiff argues additionally that the Act does not pass the rational relationship test. Plaintiff argues that there is no rational reason why a program which is supposed to benefit the entire industry should be subsidized by producers and importers only. The court disagrees. As noted in *Frame*, there are several rational bases for Congress' decision: an assessment on the initial sale of cattle

is easier to administer; ranchers would be the most benefitted by the Act; ranchers could pass the cost on to others. *Frame*, 885 F.2d at 1137-38. Finally, Congress may have wanted to grant cattle producers the maximum influence in shaping the program and imposed upon them the corresponding financial burdens. *Id.* at 1138. Accordingly, this court rejects plaintiff's equal protection challenge to the Beef Promotion Act.

Given this resolution, the court need not address the remaining arguments of defendant and intervenors. Any arguments of the plaintiff which the court has not specifically addressed herein have been considered and rejected by the court.

IT IS BY THE COURT THEREFORE ORDERED that the motions to dismiss filed by the defendant (Doc. 29, Doc. 112) and the intervenors (Doc. 101, Doc. 110) are hereby granted.

IT IS FURTHER ORDERED that the plaintiff's motions for summary judgment (Doc. 73, Doc. 118, and Doc. 131) are hereby denied.

IT IS FURTHER ORDERED that plaintiff's motion for class certification (Doc. 22) is moot.

IT IS FURTHER ORDERED that the defendant's motion for reconsideration (Doc. 32) is hereby granted. The court hereby sets aside the prior orders (Doc. 5, Doc. 7, Doc. 19, and Doc. 28) which enjoined and stayed the administrative proceedings pending against the plaintiff.

APPENDIX C

CITATION:

Beef Promotion and Research Act of 1985,
7 U.S.C. §§ 2901-2911 (1997)

§ 2901. Congressional findings and declaration of policy

(a) Congress finds that –

(1) beef and beef products are basic foods that are a valuable part of human diet;

(2) the production of beef and beef products plays a significant role in the Nation's economy, beef and beef products are produced by thousands of beef producers and processed by numerous processing entities, and beef and beef products are consumed by millions of people throughout the United States and foreign countries;

(3) beef and beef products should be readily available and marketed efficiently to ensure that the people of the United States receive adequate nourishment;

(4) the maintenance and expansion of existing markets for beef and beef products are vital to the welfare of beef producers and those concerned with marketing, using, and producing beef products, as well as to the general economy of the Nation;

(5) there exist established State and national organizations conducting beef promotion, research, and consumer education programs that are invaluable to the efforts of promoting the consumption of beef and beef products; and

(6) beef and beef products move in interstate and foreign commerce, and beef and beef products that do not move in such channels of commerce directly burden or affect interstate commerce of beef and beef products.

(b) It, therefore, is declared to be the policy of Congress that it is in the public interest to authorize the establishment, through the exercise of the powers provided herein, of an orderly procedure for financing (through assessments on all cattle sold in the United States and on cattle, beef, and beef products imported into the United States) and carrying out a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products. Nothing in this Act [7 USCS §§ 2901 et seq.] shall be construed to limit the right of individual producers to raise cattle.

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§ 2902. Definitions

For purposes of this Act [7 USCS §§ 2901 et seq.] –

(1) the term "beef" means flesh of cattle;

(2) the term "beef products" means edible products produced in whole or in part from beef, exclusive of milk and products made therefrom;

(3) the term "Board" means the Cattlemen's Beef Promotion and Research Board established under section 5(1) [7 USCS § 2904(1)];

(4) the term "cattle" means live domesticated bovine animals regardless of age;

(5) the term "Committee" means the Beef Promotion Operating Committee established under section 5(4) [7 USCS § 2904(5)];

(6) the term "consumer information" means nutritional data and other information that will assist consumers and other persons in making evaluations and decisions regarding the purchasing, preparing, and use of beef and beef products;

(7) the term "Department" means the Department of Agriculture.

(8) the term "importer" means any person who imports cattle, beef, or beef products from outside the United States;

(9) the term "industry information" means information and programs that will lead to the development of new markets, marketing strategies, increased efficiency, and activities to enhance the image of the cattle industry;

(10) The term "order" means a beef promotion and research order issued under section 4 [7 USCS § 2903].

(11) the term "person" means any individual, group of individuals, partnership, corporation, association, cooperative, or any other entity;

(12) the term "producer" means any person who owns or acquires ownership of cattle, except that a person shall not be considered to be a producer if the person's only share in the proceeds of a sale of cattle or beef is a sales commission, handling fee, or other service fee;

(13) the term "promotion" means any action, including paid advertising, to advance the image and desirability of beef and beef products with the express intent of improving the competitive position and stimulating sales of beef and beef products in the marketplace;

(14) the term "qualified State beef council" means a beef promotion entity that is authorized by State statute or is organized and operating within a State, that receives voluntary contributions and conducts beef promotion, research, and consumer information programs, and that is recognized by the Board as the beef promotion entity within such State;

(15) the term "research" means studies testing the effectiveness of market development and promotion efforts, studies relating to the nutritional value of beef and beef products, other related food science research, and new product development;

(16) the term "Secretary" means the Secretary of Agriculture;

(17) The term "State" means each of the 50 States; and

(18) the term "United States" means the several States and the District of Columbia.

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§ 2903. Issuance of orders

(a) During the period beginning on the effective date of this section and ending thirty days after receipt of a proposal for a beef promotion and research order, the Secretary shall publish such proposed order and give due notice and opportunity for public comment on such proposed order. Such proposal may be submitted by any organization meeting the requirements for certification under section 6 or any interested person, including the Secretary.

(b) After notice and opportunity for public comment are given, as provided for in subsection (a), the Secretary shall issue a beef promotion and research order. The order shall become effective not later than one hundred and twenty days following publication of the proposed order.

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§ 2904. Required terms in orders

An order issued under section 4(b) shall contain the following terms and conditions:

(1) The order shall provide for the establishment and selection of a Cattlemen's Beef Promotion and Research Board. Members of the Board shall be cattle producers and importers appointed by the Secretary from (A) nominations submitted by eligible State organizations certified under section 6 [7 USCS § 2905] (or, if the Secretary determines that there is no eligible State organization in a State, the Secretary may provide for nominations from such State to be made in a different manner), and (B) nominations submitted by importers under such procedures as the Secretary determines appropriate. In determining geographic representation for cattle producers on the Board, whole States shall be considered as a unit. Each State that has a total cattle inventory greater than five hundred thousand head shall be entitled to at least one representative on the Board. A State that has a total inventory of fewer than 500,000 cattle shall be grouped, as far as practicable, with other States each of which has a combined total inventory of not

less than 500,000 cattle, into geographically contiguous units in a manner prescribed in the order. A unit may be represented on the Board by more than one member. For each additional million head of cattle within a unit, such unit shall be entitled to an additional member on the Board. The Board may recommend a change in the level of inventory per unit necessary for representation on the Board and, on such recommendation, the Secretary may change the level necessary for representation on the Board. The number of members on the Board that represent importers shall be determined by the Secretary on a proportional basis, by converting the volume of imported beef and beef products into live animal equivalencies.

(2) The order shall define the powers and duties of the Board, which shall be exercised at an annual meeting, and shall include only the following powers:

(A) To administer the order in accordance with its terms and provisions.

(B) To make rules and regulations to effectuate the terms and provisions of the order.

(C) To elect members of the Board to serve on the Committee.

(D) To approve or disapprove budgets submitted by the Committee.

(E) To receive, investigate, and report to the Secretary complaints of violations of the order.

(F) To recommend to the Secretary amendments to the order.

In addition, the order shall determine the circumstances under which special meetings of the Board may be held.

(3) The order shall provide that the term of appointment to the Board shall be three years with no member serving more than two consecutive terms, except that initial appointments shall be proportionately for one-year, two-year, and three-year terms; and that Board members shall serve without compensation, but shall be reimbursed for their reasonable expenses incurred in performing their duties as members of the Board.

(4) (A) The order shall provide that the Board shall elect from its membership ten members to serve on the Beef Promotion Operating Committee, which shall be composed of ten members of the Board and ten producers elected by a federation that includes as members the qualified State beef councils. The producers elected by the federation shall be certified by the Secretary as producers that are directors of a qualified State beef council. The Secretary also shall certify that such directors are duly elected by the federation as representatives to the Committee.

(B) The Committee shall develop plans or projects of promotion and advertising, research, consumer information, and industry information, which shall be paid for with assessments collected by the Board. In developing plans or projects, the Committee shall –

(i) to the extent practicable, take into account similarities and differences between certain beef, beef products, and veal; and

(ii) ensure that segments of the beef industry that enjoy a unique consumer identity receive equitable and fair treatment under this Act [7 USCS §§ 2901 et seq.].

(C) The Committee shall be responsible for developing and submitting to the Board, for its approval, budgets on a fiscal year basis of its anticipated expenses and disbursements, including probable costs of advertising and promotion, research, consumer information, and industry information projects. The Board shall approve or disapprove such budgets and, if approved, shall submit such budget to the Secretary for the Secretary's approval.

(D) The total costs of collection of assessments and administrative staff incurred by the Board during any fiscal year shall not exceed 5 per centum of the projected total assessments to be collected by the Board for such fiscal year. The Board shall use, to the extent possible, the resources, staffs, and facilities of existing organizations.

(5) The order shall provide that terms of appointment to the Committee shall be one year, and that no person may serve on the Committee for more than six consecutive terms. Committee members shall serve without compensation, but shall be reimbursed for their reasonable expenses incurred in performing their duties as members of the Committee. The Committee may utilize the resources, staffs, and facilities of the Board and industry organizations. An employee of an industry organization may not receive compensation for work performed for the Committee, but shall be reimbursed from assessments collected by the Board for reasonable expenses incurred in performing such work.

(6) The order shall provide that, to ensure coordination and efficient use of funds, the Committee shall enter into contracts or agreements for implementing and carrying out the activities authorized by this Act

[7 USCS §§ 2901 et seq.] with established national nonprofit industry-governed organizations, including the federation referred to in paragraph (4), to implement programs of promotion, research, consumer information, and industry information. Any such contract or agreement shall provide that –

(A) the person entering the contract or agreement shall develop and submit to the Committee a plan or project together with a budget or budgets that shows estimated costs to be incurred for the plan or project;

(B) the plan or project shall become effective on the approval of the Secretary; and

(C) the person entering the contract or agreement shall keep accurate records of all of its transactions, account for funds received and expended, and make periodic reports to the Committee of activities conducted, and such other reports as the Secretary, the Board, or the Committee may require.

(7) The order shall require the Board and the Committee to –

(A) maintain such books and records, which shall be available to the Secretary for inspection and audit, as the Secretary may prescribe;

(B) prepare and submit to the Secretary, from time to time, such reports as the Secretary may prescribe; and

(C) account for the receipt and disbursement of all funds entrusted to them.

(8)(A) The order shall provide that each person making payment to a producer for cattle purchased from the producer shall, in the manner prescribed by

the order, collect an assessment and remit the assessment to the Board. The Board shall use qualified State beef councils to collect such assessments.

(B) If an appropriate qualified State beef council does not exist to collect an assessment in accordance with paragraph (1), such assessment shall be collected by the Board.

(C) The order also shall provide that each importer of cattle, beef, or beef products shall pay an assessment, in the manner prescribed by the order, to the Board. The assessments shall be used for payment of the costs of plans and projects, as provided for in paragraph (4), and expenses in administering the order, including more administrative costs incurred by the Secretary after the order has been promulgated under this Act [7 USCS §§ 2901 et seq.], and to establish a reasonable reserve. The rate of assessment prescribed by the order shall be one dollar per head of cattle, or the equivalent thereof in the case of imported beef and beef products. A producer who can establish that the producer is participating in a program of an established qualified State beef council shall receive credit, in determining the assessment due from such producer, for contributions to such program of up to 50 cents per head of cattle or the equivalent thereof. There shall be only one qualified State beef council in each State. Any person marketing from beef from cattle of the person's own production shall remit the assessment to the Board in the manner prescribed by the order.

(9) The order shall provide that the Board, with the approval of the Secretary, may invest, pending disbursement, funds collected through assessments only in obligations of the United States or any agency

thereof, in general obligations of any State or any political subdivision thereof, in any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or in obligations fully guaranteed as to principal and interest by the United States.

(10) The order shall prohibit any funds collected by the Board under the order from being used in any manner for the purpose of influencing governmental action or policy, with the exception of recommending amendments to the order.

(11) The order shall require that each person making payment to a producer, any person marketing beef from cattle of the person's own production directly to consumers, and any importer of cattle, beef, or beef products maintain and make available for inspection such books and records as may be required by the order and file reports at the time, in the manner, and having the content prescribed by the order. Such information shall be made available to the Secretary as is appropriate to the administration or enforcement of this Act [7 USCS §§ 2901 et seq.], the order, or any regulation issued under this Act [7 USCS §§ 2901 et seq.]. In addition, the Secretary shall authorize the use of information regarding persons paying producers that is accumulated under a law or regulation other than this Act or regulations under this Act.

All information so obtained shall be kept confidential by all officers and employees of the Department, and only such information so obtained as the Secretary deems relevant may be disclosed by them and then only in a suit or administrative hearing brought at the request of the Secretary, or to which the Secretary or any officer of the United States is a party, and

involving the order. Nothing in this paragraph may be deemed to prohibit –

(A) the issuance of general statements, based on the reports, of the number of persons subject to the order or statistical data collected therefrom, which statements do not identify the information furnished by any person; or

(B) the publication, by direction of the Secretary, of the name of any person violating the order, together with a statement of the particular provisions of the order violated by the person.

No information obtained under the authority of this Act [7 USCS §§ 2901 et seq.] may be made available to any agency or officer of the United States for any purpose other than the implementation of this Act [7 USCS §§ 2901 et seq.] and any investigatory or enforcement act necessary for the implementation of this Act [7 USCS §§ 2901 et seq.]. Any person violating the provisions of this paragraph shall be subject to a fine of not more than $1,000, or to imprisonment for not more than one year, or both, and if an officer or employee of the Board or the Department, shall be removed from office.

(12) The order shall contain terms and conditions, not inconsistent with the provisions of this Act [7 USCS §§ 2901 et seq.], as necessary to effectuate the provisions of the order.

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§ 2905. Certification of organizations to nominate

(a) Eligibility of any State organization certified by Secretary; eligibility criteria. The eligibility of any State organization to represent producers and to participate in the making of nominations under section 5(1) [7 USCS § 2904(1)] shall be certified by the Secretary. The Secretary shall certify any State organization that the Secretary determines meets the eligibility criteria established under subsection (b) and such determination as to eligibility shall be final.

(b) State cattle association or State general farm organization. A State cattle association or State general farm organization may be certified as described in subsection (a) if such association or organization meets all of the following eligibility criteria:

(1) The association or organization's total paid membership is comprised of at least a majority of cattle producers or the association or organization's total paid membership represents at least a majority of the cattle producers in the State.

(2) The association or organization represents a substantial number of producers that produce a substantial number of cattle in the State.

(3) The association or organization has a history of stability and permanency.

(4) A primary or overriding purpose of the association or organization is to promote the economic welfare of cattle producers.

(c) Factual report basis for certification of State cattle association State general farm association. Certification

of State cattle associations and State general farm organizations shall be based on a factual report submitted by the association or organization involved.

(d) Certification of more than one State organization; caucus. If more than one State organization is certified in a State (or in a unit referred to in section 5(1)) [7 USCS § 2904(1)], such organizations may caucus to determine any of such State's (or such unit's) nominations under section 5(1) [7 USCS § 2904(1)].

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§ 2906. Requirement of referendum

(a) Continuation or termination of order. For the purpose of determining whether the initial order shall be continued, not later than 22 months after the issuance of the order (or any earlier date recommended by the Board), the Secretary shall conduct a referendum among persons who have been producers or importers during a representative period, as determined by the Secretary. The order shall be continued only if the Secretary determines that it has been approved by not less than a majority of the producers voting in the referendum who, during a representative period as determined by the Secretary, have been engaged in the production of cattle. If continuation of the order is not approved by a majority of those voting in the referendum, the Secretary shall terminate collection of assessments under the order within six months after the Secretary determines that continuation of the order is not favored by a majority voting in the

referendum and shall terminate the order in an orderly manner as soon as practicable after such determination.

(b) Additional referendum to determine suspension or termination of order. After the initial referendum, the Secretary may conduct a referendum on the request of a representative group comprising 10 per centum or more of the number of cattle producers to determine whether cattle producers favor the termination or suspension of the order. The Secretary shall suspend or terminate collection of assessments under the order within six months after the Secretary determines that suspension or termination of the order is favored by a majority of the producers voting in the referendum who, during a representative period as determined by the Secretary, have been engaged in the production of cattle and shall terminate or suspend the order in an orderly manner as soon as practicable after such determination.

(c) Reimbursement for cost of referendum; time and place of referendum; certification by producers; absentee mail ballot. The Department shall be reimbursed from assessments collected by the Board for any expenses incurred by the Department in connection with conducting any referendum under this section, except for the salaries of Government employees. Any referendum conducted under this section shall be conducted on a date established by the Secretary, whereby producers shall certify that they were engaged in the production of cattle during the representative period and, on the same day, shall be provided an opportunity to vote in the referendum. Each referendum shall be conducted at county

extension offices, and there shall be provision for an absentee mail ballot on request.

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§ 2907. Refunds

(a) Establishment of escrow account. During the period prior to the approval of the continuation of an order pursuant to the referendum required under section 7(a) [7 USCS § 2906(a)], subject to subsection (f), the Board shall –

(1) establish an escrow account to be used for assessment refunds;

(2) place funds in such account in accordance with subsection (b); and

(3) refund assessments to persons in accordance with this section.

(b) Funding escrow account. Subject to subsection (f), the Board shall place in such account, from assessments collected under section 7 [7 USCS § 2906] during the period referred to in subsection (a), an amount equal to the product obtained by multiplying –

(1) the total amount of assessments collected under section 7 [7 USCS § 2906] during such period; by

(2) the greater of –

(A) the average rate of assessment refunds provided to producers under State beef promotion, research, and consumer information programs financed through producer assessments, as determined by the Board; or (B) 15 percent.

(c) Demand and receipt of one-time refund. Subject to subsections (d), (e), and (f) and notwithstanding any other provision of this subtitle [7 USCS §§ 2901 et seq.], any person shall have the right to demand and receive from the Board a one-time refund of all assessments collected under section 7 [7 USCS § 2906] from such person during the period referred to in subsection (a) if such person –

(1) is responsible for paying such assessment; and

(2) does not support the program established under this Act [7 USCS §§ 2901 et seq.].

(d) Form and time period for demand for one-time refund. Such demand shall be made in accordance with regulations, on a form, and within a time period prescribed by the Board.

(e) Submission of proof for one-time refund. Such refund shall be made on submission of proof satisfactory to the Board that the producer, person, or importer –

(1) paid the assessment for which refund is sought; and

(2) did not collect such assessment from another producer, person, or importer.

(f) Insufficiency of funds in escrow account; proration of funds among eligible persons. (1) If the amount in the escrow account required to be established by subsection (a) is not sufficient to refund the total amount of assessments demanded by all eligible persons under this section and the continuation of an order is approved pursuant to the referendum required under section 10(a) [7 USCS § 2909(a)], the Board shall –

(A) continue to place in such account, from assessments collected under section 5 [7 USCS § 2904], the amount required under subsection (b), until such time as the Board is able to comply with subparagraph (B); and

(B) provide to all eligible persons the total amount of assessments demanded by all eligible producers.

(2) If the amount in the escrow account required to be established by subsection (a) is not sufficient to refund the total amount of assessments demanded by all eligible persons under this section and the continuation of an order is not approved pursuant to the referendum required under section 7(a) [7 USCS § 2906(a)], the Board shall prorate the amount of such refunds among all eligible persons who demand such refund.

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§ 2908. Enforcement

(a) Restraining order; civil penalty. If the Secretary believes that the administration and enforcement of this Act [7 USCS § 2901 et seq.] or an order would be adequately served by such procedure, following an opportunity for an administrative hearing on the record, the Secretary may –

(1) issue an order to restrain or prevent a person from violating an order; and

(2) assess a civil penalty of not more than $5,000 for violation of such order.

(b) Jurisdiction of district court. The district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain a person from violating, an order or regulation made or issued under this act [7 USCS § 2901 et seq.].

(c) Civil action to be referred to Attorney General. A civil action authorized to be brought under this section shall be referred to the Attorney General for appropriate action.

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§ 2909. Investigations by Secretary; oaths and affirmations; subpoenas; judicial enforcement; contempt proceedings; service of process

The Secretary may make such investigations as the Secretary deems necessary for the effective administration of this Act [7 USCS §§ 2901 et seq.] or to determine whether any person subject to this Act [7 USCS §§ 2901 et seq.] has engaged or is about to engage in any act that constitutes or will constitute a violation of this Act [7 USCS §§ 2901 et seq.], the order, or any rule or regulation issued under this Act [7 USCS §§ 2901 et seq.] For the purpose of such investigation, the Secretary may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any records that are relevant to the inquiry. The attendance of witnesses and the production of records may be required from any place in the United States. In case of contumacy by, or refusal to obey a subpoena to, any person, the

Secretary may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of the person and the production of records. The court may issue an order requiring such person to appear before the Secretary to produce records or to give testimony regarding the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof. Process in any such case may be served in the judicial district in which such person is an inhabitant or wherever such person may be found.

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§ 2910. Administrative provisions

(a) Nothing in this Act [7 USCS §§ 2901 et seq.] may be construed to preempt or supersede any other program relating to beef promotion organized and operated under the laws of the United States or any State.

(b) The provisions of this Act [7 USCS §§ 2901 et seq.] applicable to the order shall be applicable to amendments to the order.

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§ 2911. Authorization of appropriations

There are authorized to be appropriated such sums as may be necessary to carry out this Act [7 USCS §§ 2901 et seq.]. Sums appropriated to carry out this Act [7 USCS §§ 2901 et seq.] shall not be available for payment of the expenses or expenditures of the Board or the Committee in administering any provisions of the order issued under section 4(b) of this Act [7 USCS § 2903(b)].

APPENDIX D

CITATION:

7 C.F.R. §§ 1260.101-1260.640 (1994)
(selected portions only).

§ 1260.106 Collecting person.

"Collecting person" means the person making payment to a producer for cattle, or any other person who is responsible for collecting and remitting an assessment pursuant to the Act, the order and regulations prescribed by the Board and approved by the Secretary.

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§ 1260.116 Producer.

"Producer" means any person who owns or acquires ownership of cattle; provided, however, that a person shall not be considered a producer within the meaning of this subpart if (a) the person's only share in the proceeds of a sale of cattle or beef is a sales commission, handling fee, or other service fee; or (b) the person (1) acquired ownership of cattle to facilitate the transfer of ownership of such cattle from the seller to a third party, (2) resold such cattle no later than ten (10) days from the date on which the person acquired ownership, and (3) certified, as required by regulations prescribed by the Board and approved by the Secretary, that the requirements of this provision have been satisfied.

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§ 1260.141 Membership of Board.

* * *

(b) The Board shall be composed of cattle producers and importers appointed by the Secretary from nominations submitted pursuant to the Act and regulations of this Part. A producer may only be nominated to represent the unit in which that producer is a resident.

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§ 1260.150 Duties of the Board.

The Board shall have the following duties:

* * *

(d) To elect from its members 10 representatives to the Beef Promotion Operating Committee which shall be composed of 10 members from the Board and 10 members elected by the Federation;

* * *

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§ 1260.168 Duties of the Committee.

The Committee shall have the following duties:

* * *

(b) To contract with established national nonprofit industry-governed organizations to implement programs

of promotion, research, consumer information and industry information;

* * *

(d) To prepare and submit to the Board for approval budgets on a fiscal-period basis of its anticipated expenses and disbursements in the administration of its responsibilities, including probable costs of promotion, research, consumer information and industry information plans or projects, and also including a general description of the proposed promotion, research, consumer information and industry information programs contemplated therein;

(e) To develop and submit to the Secretary for approval promotion, research, consumer information and industry information plans or projects;

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§ 1260.169 Promotion, research, consumer information and industry information.

The Committee shall receive and evaluate, or on its own initiative, develop and submit to the Secretary for approval any plans and projects for promotion, research, consumer information and industry information authorized by this subpart. Such plans and projects shall provide for:

(a) The establishment, issuance, effectuation, and administration of appropriate plans or projects for promotion, research, consumer information and industry

information, with respect to beef and beef products designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products;

(b) The establishment and conduct of research and studies with respect to the sale, distribution, marketing, and utilization of beef and beef products and the creation of new products thereof, to the end that marketing and utilization of beef and beef products may be encouraged, expanded, improved or made more acceptable in the United States and foreign markets;

(c) Each plan or project authorized under paragraph (a) and (b) of this section shall be periodically reviewed or evaluated by the Committee to ensure that each such plan or project contributes to an effective program of promotion, research, consumer information and industry information. If it is found by the Committee that any such plan or project does not further the purposes of the Act, then the Committee shall terminate such plan or project;

(d) In carrying out any plan or project of promotion or advertising implemented by the Committee, no reference to a brand or trade name of any beef product shall be made without the approval of the Board and the Secretary. No such plans or projects shall make use of any unfair or deceptive acts or practices, including unfair or deceptive acts or practices with respect to the quality, value or use of any competing product; and

(e) No funds collected by the Board under this subpart shall in any manner be used for the purpose of influencing governmental policy or action, except to recommend to the Secretary amendments to this part.

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§ 1260.172 Assessments.

(a) *Domestic assessments.* (1) Except as prescribed by regulations approved by the Secretary, each person making payment to a producer for cattle purchased from such producer shall be a collecting person and shall collect an assessment from the producer, and each producer shall pay such assessment to the collecting person, at the rate of one dollar ($1) per head of cattle purchased and such collecting person shall remit the assessment to the Board or to a qualified State beef council pursuant to § 1260.172(a)(5).

* * *

(3) In determining the assessment due from each producer pursuant to § 1260.172(a), a producer who is contributing to a qualified State beef council(s) shall receive a credit from the Board for contributions to such Council, but not to exceed 50 cents per head of cattle assessed.

(4) In order for a producer described in § 1260.172(a) to receive the credit authorized in § 1260.172(a)(3), the qualified State beef council or the collecting person much establish to the satisfaction of the Board that the producer has contributed to a qualified State beef council.

(5) Each person responsible for the remittance of the assessment pursuant to § 1260.172(a)(1) and (2) shall remit the assessment to the qualified State beef council in the State from which the cattle originated prior to sale, or if there is no qualified State beef council within such State, the assessment shall be remitted directly to the

Board. However, the Board, with the approval of the Secretary, may authorize qualified State beef councils to propose modifications to the foregoing "State of origin" rule to ensure effective coordination of assessment collections between qualified State beef councils. Qualified State beef councils and the Board shall coordinate assessment collection procedures to ensure that producers selling or marketing cattle in interstate commerce are required to pay only one assessment per individual sale of cattle. For the purpose of this subpart, "State of origin" rule means the State where the cattle were located at time of sale, or the State in which the cattle were located prior to sale if such cattle were transported interstate for the sole purpose of sale. Assessments shall be remitted not later than the 15th day of the month following the month in which the cattle were purchased or marketed.

(6) If a State law or regulation promulgated pursuant to State law requires the payment and collection of a mandatory, nonrefundable assessment of more [sic] fifty (50) cents per head on the sale and purchase of cattle, or the equivalent thereof for beef and beef products as described in § 1260.172(a)(1) and (2) for use by a qualified State beef council to fund activities similar to those described in § 1260.169, and such State law or regulation authorizes the issuance of a credit of that amount of the assessment which exceeds fifty (50) cents to producers who waive any right to the refund of the assessment credited by the State due pursuant to this subpart, then any producer subject to such State law of regulation who pays only the amount due pursuant to such State law or regulation and this subpart, including any credits issued, shall thereby waive that producer's right to receipt from

the Board of a refund of such assessment for that portion of such refund for which the producer received credit pursuant to such State law or regulation.

(b) *Importer assessments.* (1) Importers of cattle, beef, and beef products into the United States shall pay an assessment to the Board through the U.S. Customs Service, or in such other manner as may be established by regulations approved by the Secretary.

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§ 1260.173 Refunds.

Any producer of [sic] importer from whom an assessment is collected and remitted to the Board, or who pays an assessment directly to the Board, under authority of the Act and this subpart, and who is not in favor of supporting the promotion and research program as provided for in this subpart shall have the right to demand and receive from the Board a refund of such assessment, or a prorata share thereof, upon submission of proof satisfactory to the Board that the producer or importer paid the assessment for which refund is sought. Any such demand shall be made by such producer or importer in accordance with the provisions of this subpart and in a manner consistent with regulations prescribed by the Board and approved by the Secretary.

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§ 1260.174 Procedure for obtaining refund.

Each producer or importer who pays an assessment pursuant to the Act and this subpart during the period prior to the referendum may obtain a refund of such assessment only by following the procedures prescribed in this section and any regulations prescribed by the Board and approved by the Secretary.

(a) *Application form.* Board-approved refund application forms may be obtained by written request to a qualified State beef council or the Board.

(b) *Submission of refund application to Board.* Any producer or importer requesting a refund shall mail an application on the prescribed form to a qualified State beef council or the Board within 60 days from the date the assessments were due from such producer or importer. The refund application shall show:

(1) The producer's or importer's name and address;

(2) Collecting person's name and address;

(3) Number of head of cattle, or its equivalent on which a refund is requested;

(4) Total amounts of refund requested;

(5) Date or inclusive dates on which assessments were paid;

(6) Certification that the producer or importer did not collect the assessment from another producer or importer; and

(7) The producer's or importer's signature or properly witnessed mark.

(c) *Proof of payment of assessment.* The invoice or accounting given to the producer or importer by the collecting person or a copy thereof, or such other evidence deemed satisfactory by the Board shall accompany the producer's or the importer's refund application.

(d) *Payment of refunds.* The Board shall pay refund requests or a prorata share thereof within 90 days of the date the results of the referendum are released by the Secretary. Refunds shall be paid in a manner consistent with § 1260.150(j).

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§ 1260.181 Qualified State beef councils.

* * *

(b) In order for the State beef council to be certified by the Board as a qualified State beef council, the council must:

(1) Conduct activities as defined in § 1260.169 that are intended to strengthen the beef industry's position in the marketplace;

(2) Submit to the Board a report describing the manner in which assessments are collected and the procedure utilized to ensure that assessments due are paid;

(3) Certify to the Board that such council will collect assessments paid on cattle originating from the State or unit within which the council operates and shall establish

procedures for ensuring compliance with this subpart with regard to the payment of such assessments;

(4) Certify to the Board that such organization shall remit to the Board assessments paid and remitted to the council, minus authorized credits issued to producers pursuant to § 1260.172(a)(3), by the last day of the month in which the assessment was remitted to the qualified State beef council unless the Board determines a different date for remittance of assessments.

(5) Councils which are authorized or required to pay refunds to producers must certify to the Board that any requests from producers for refunds from the council for contributions to such council by the producer will be honored by forwarding to the Board that portion of such refunds equal to the amount of credit received by the producer for contributions to the council pursuant to § 1260.172(a)(3);

(6) Certify to the Board that the council will furnish the Board with an annual report by a certified public accountant of all funds remitted to such council pursuant to this subpart and any other reports and information the Board or Secretary may request; and

(7) Not use council funds collected pursuant to this subpart for the purpose of influencing governmental policy or action, or to fund plans or projects which make use of any unfair or deceptive acts or practices including unfair or deceptive acts or practices with respect to the quality, value or use of any competing product.

§ 1260.310 Domestic assessments.

(a) A $1.00 per head assessment on cattle sold shall be paid by the producer of the cattle in the manner designated in § 1260.311.

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§ 1260.311 Collecting persons for purposes of collection of assessments.

Collecting persons for purposes of collecting and remitting the $1.00 per head assessment shall be:

(a) Except as provided in paragraph (b) and (c) of this section, each person making payment to a producer for cattle purchased in the United States shall collect from the producer an assessment at the rate of $1.00 per head of cattle purchased and shall be responsible for remitting assessments to the qualified State beef council or the Cattlemen's Board as provided in § 1260.312. The collecting person shall collect the assessment at the time the collecting person makes payment or any credit to the producer's account for the cattle purchased. The person paying the producer shall give the producer a receipt indicating payment of the assessment.

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§ 1260.312 Remittance to the Cattlemen's Board or Qualified State Beef Council.

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(c) *Remittances.* The remitting person shall remit all assessments to the qualified State beef council or its designee, or, if there is no qualified State beef council, to the Cattlemen's Board at P.O. Box 27-275; Kansas City, Missouri 64180-0001, with the report required in paragraph (a) of this section not later than the 15th day of the following month. All remittances sent to a qualified State beef council or the Cattlemen's Board by the remitting persons shall be by check or money order payable to the order of the qualified State beef council or the Cattlemen's Board. All remittances shall be received subject to collection and payment at par.

APPENDIX E

CITATION:

Intervenors' December 1, 1994 "Memorandum of Points and Authorities in Support of Petition For Leave to Intervene" filed in the district court below ("Intervenors' Memorandum"), pp. 11-15 (relevant excerpts only).

* * *

Kansas Livestock Association

The Kansas Livestock Association ("KLA") is a Kansas non-profit corporation. The KLA is an association of cattle producers who are based in Kansas. Kansas is the second largest beef-producing state in the country (next to Texas) and the KLA is the largest cattle association in Kansas. The KLA thus acts as the *primary representative* of the Kansas cattle industry – an industry that is substantial.

* * *

In addition, the KLA contracts with the Kansas Beef Council, a separate division of KLA and a "qualified state beef council" under the Act and Order, to conduct beef promotion and research programs. These contracts are funded by assessments collected through the Beef Checkoff Program. Through these contracts, the KLA conducts programs of promotion and education for the benefit of the Kansas beef industry. The funds collected by Goetz as a purchaser of cattle (and therefore a "collecting person" under the Act and Order), which he was required to remit to the Kansas Beef Council, and the funds which Goetz was required to pay as a seller of cattle were to be a part of the funding for the Kansas Beef Council's beef promotion efforts.

While the KLA itself is seeking to intervene in this action in order to represent the significant interests of its membership in this action, it has an additional, substantial interest in this matter in that a separate division of the KLA is the Kansas Beef Council (the "KBC"). The

KBC is the sole *qualified state beef council* for the State of Kansas under the Beef Promotion Act and Order.

It is the KBC which collects the dollar ($1.00) per head assessments from collecting persons in connection with Kansas beef sales – retaining fifty (50) cents of each dollar collected to fund state beef promotion and research efforts, and sending the other fifty (50) cents to the Cattlemen's Beef Board for the funding of national beef promotion and research efforts.

* * *

National Cattlemen's Association

The National Cattlemen's Association ("NCA") is a Colorado non-profit corporation. The NCA's primary corporate purposes are to protect the cattle industry in the United States, promote the importance of the cattle industry, and provide an official and united voice on issues of importance to cattle producers and feeders. The membership of the NCA includes participants from all sectors of the cattle and domestic beef industry. The NCA has represented, on a nationwide basis, the interests of the United States domestic beef industry since long before passage of the Beef Promotion Act. In fact, the NCA played a crucial role in petitioning Congress to pass the Beef Promotion Act and was actively involved in the overall design of the Act and the Order. The NCA thus acts as the primary national representative of the domestic cattle industry.

* * *

In addition, the NCA regularly enters into contracts with the Operating Committee funded by assessments

collected through the Beef Checkoff Program to implement the Act.

* * *

The Beef Industry Council

The National Live Stock and Meat Board is an Illinois non-profit corporation. The Beef Industry Council ("BIC") is a division of the NLSMB. The BIC is the federation of qualified state beef councils that is designated in the Act and Order to elect 10 members (one-half of the membership) to the Operating Committee. *United States v. Frame*, 885 F.2d at 1123, 7 U.S.C. § 2904(4)(A), 7 C.F.R. § 1260.112 (" 'Federation' means the Beef Industry Council of the National Live Stock and Meat Board, or any successor organization to the Beef Industry Council . . . ").

In addition, the BIC regularly enters into contracts for the promotion of beef with the Operating Committee. These contracts are funded by assessments collected through the Beef Checkoff Program. The BIC also contracts with many individual qualified state beef councils who pool some of their resources (qualified state beef councils retain fifty cents of each checkoff dollar collected under the Beef Checkoff Program) to fund coordinated promotion programs they operated through the BIC.

The NLSMB has been conducting beef promotion programs for 72 years and its BIC division has been the federation of state beef councils for 31 years. Currently, a substantial portion of the fifty cents of the dollar that is allocated to the Cattlemen's Beef Board *and* the fifty cents

of the dollar retained by qualified state beef councils is paid to the BIC to fund beef promotion and research activities. Thus, the BIC has a substantial and particular interest in the subject matter of this action.

* * *

APPENDIX F

CITATION:

The Checkoff Connection, BEEF TODAY, Feb. 1989, pp. 18-19.

THE CHECKOFF CONNECTION

Want to feel like a mouse put through his paces? Then try to follow the path of checkoff funds through the maze that ends at NCA's doorstep.

Of the five general areas that receive Beef Board funding, two are of primary concern here. One is the producer-communications or "feedback" area, which basically spends money on telling producers how the money is being spent. "Accountability" is the Beef Board's word. In the past two fiscal years (1987 and '88), NCA had contracts approved for $821,689 of the $3.88 million that the Beef Board spent on producer communication. The fiscal 1988-89 budget calls for $2.8 million (plus $838,496 carry-over) for producer communications. Some $106,000 for NCA projects had already been approved by the Beef Board, but about $2.3 million was unallocated at presstime; NCA is requesting an additional $941,000 in project funds for '88-89.

But of more importance to NCA is the Beef Board's $2.1 million (1988-89 budget) for industry information, which spends money on projects to benefit the beef industry. Now enter the maze, with the National Cattlemen's Foundation (NCF).

This nonprofit group has been hired by the Beef Board to screen and recommend all the industry-information programs. This year the Beef Board will pay NCF $219,300 to do that; last year the price tag was $69,500. The Beef Board emphasizes that all money paid to NCF under this contract must be strictly accounted for.

But since the Beef Board basically sublets the responsibility for screening and recommending projects in this area to NCF, another kind of accountability issue surfaces: Just who is NCF and how impartial is this screening process?

NCF has no employees. It is staffed and governed almost exclusively by the National Cattlemen's Association. In fact, NCF's screening committee is made up of one representative from each of NCA's 10 policy committees and its three councils, with one representative each from the dairy and veal industry. People working for NCF get paid by NCA, and NCA in return gets paid by the Beef Board for the time and expense they incur "screening, implementing and recommending" projects to the board.

It could be argued that giving NCF the responsibility for screening projects is essentially no different from giving that responsibility to NCA itself. Yet both NCF and NCA are major contractors vying for industry information project funds. It is a tight fraternity that saw NCA or NCF get 100% of the $183,428 industry information funds in the Beef Board's 1986-87 fiscal year, and 97% of the $515,813 the board spent in this area in '87-88. The 1988-89 Beef Board Budget for industry information has been increased to $2.1 million. So far, NCA or NCF have 11 projects approved totaling almost $1.7 million. Indeed, no funds in this area have been approved for any other organization except Cattle-Fax, a market reporting service officed with NCA.

But it's not as if other industry organizations haven't tried to get a piece of the pie. Last fall, Beef Board

coordinator Gary Enright invited the Livestock Industry Institute, an arm of the Kansas City-based Livestock Marketing Association, to submit an industry-information proposal in the "animal production practices" area, an issue that had just received additional funding. According to LMA's Mike Sweet, LII submitted a $1-million proposal on deadline to the Beef Board dealing with animal care/animal welfare issues.

"Our proposal was printed in the agenda for the next meeting of the Beef Board's operating committee, along with a joint NCF-NCA proposal dealing with animal care, and we assumed that both would be taken up by that committee," says Sweet. "Lo and behold, there was an unscheduled conference call of the operating committee, NCA's animal-care proposal was approved, our proposal was sent back to NCF for screening, and the committee was told to disregard it in their upcoming meeting."

Although Sweet contends that procedures were changed midstream without informing LII, both NCF and Beef Board coordinator Gary Enright say the LII proposal was just inadvertently sent to the operating committee before being properly screened by NCF.

[Picture Omitted In Printing]

LII was then asked to appear before NCF's industry information screening committee, presumably to present the proposal. "We went to NCF's meeting and asked to discuss and distribute copies of our proposal, but were told that it wouldn't be necessary, because it was merely a duplication of a project already under way," says Sweet. "I asked the committee chairman if he could address the

areas of duplication, and he replied that he hadn't read our proposal specifically. On our way out the door I asked the chairman whether our proposal was dead, and his answer was yes. Whether or not the proposal should have been approved is beside the point – where is the sense of fair play? I don't think you can argue that NCF has any autonomy from NCA. How can we begin to compete?"

NCA's John Meetz says that LII was premature when it submitted its proposal for checkoff funding because there was no overall industry plan regarding animal welfare. "One of the proposals that the Operating Committee approved [during the conference call] was a project to develop a strategic plan for all segments of the industry to deal with animal welfare," Meetz explains. "LII was told that, before coming to the industry-information screening committee's meeting, and was told that its proposal would not be considered until that overall plan was complete and approved. I think it would be irresponsible on the part of the Beef Board operating committee to consider any other projects until that plan is complete."

NCF also says that the LII proposal isn't "completely" dead and that the $30,000 NCA project the Beef Board funded in the animal-care area is merely to develop the strategic plan. "It is very possible that parts of LII's proposal will fit into that strategic plan," says Darrell Wilkes, NCA-NCF staffer.

"I don't think there are degrees of being dead," responds Sweet.

A check with Beef Board coordinator Enright shows that of the $1 million earmarked for animal-production/

practice programs, $299,500 has already been allocated to NCA or NCF projects and that much of the remaining $700,500 is being sought by the Beef Industry Council in the consumer-information area.

That doesn't mean that LII won't ever have a shot at it, but Sweet thinks it is already clear that NCA and NCF want to set their own agenda in this issue area. NCA for its part insists they do not have an edge in getting industry information projects approved – because the final decision always rests with the Beef Board's operating committee. But NCA's Darrell Wilkes admits "we are privy to discussions by honest-to-goodness grassroots producers who are airing their concerns."

Wilkes also contends that checkoff money has not benefited NCA's financial condition, but then says, "From a practical point of view, if I can do my job for NCA in 40 hours a week and I work an additional 20 hours a week for NCF and charge it against industry information projects, NCA gets reimbursed from the Beef Board for that extra 20 hours I put it. But it didn't really cost NCA anything more. Multiply that times everyone here who works for NCF and it adds up."

APPENDIX G

CITATION:

Bill Miller, *Ohio Walks*, BEEF TODAY, Jan. 1991, p. 20 (relevant excerpts only).

OHIO WALKS

With those words, the Ohio Beef Council (OBC) withdrew its beef directorship from the National Live Stock and Meat Board's Beef Industry Council (BIC) in November.

* * *

Having lost patience, the OBC says it is now "unfettered by organizational ties and can speak candidly about topics that others only whisper about."

* * *

WHY OHIO'S ACTION IS IMPORTANT

■ The real issue in the Ohio Beef Council conflict with the Beef Industry Council (BIC) is checkoff dollars, who controls them and how they are spent.

A refresher: 50% of the checkoff dollars are handled by the 44 qualified state beef councils. Much of their money is sent to the BIC, but Ohio will no longer do so.

The other 50% of checkoff money is channeled through the Beef Promotion and Research Board, which reviews and approves an industry plan for spending checkoff dollars. But it is the Operating Committee of the Beef Board where the real authority for spending the bulk of checkoff money lies. The Operating Committee is made up of 10 members from the Beef Board and 10 members from the BIC.

The Federation of State Beef Councils was given 10 seats on the Operating Committee to ensure coordination of the national checkoff dollars with the checkoff dollars

controlled by the state beef councils. Some 70% of the national dollars are awarded to the BIC.

* * *

APPENDIX H

CITATION:

Second thoughts on checkoffs, HOGS TODAY, Nov. 1989, p. 39.

Second thoughts on checkoffs

■ House Agriculture Committee members are having second thoughts about mandatory checkoff programs, and may call for reforms in the next farm bill.

A close scrutiny of the American Soybean Association's proposed checkoff program, which was modeled after similar promotions for pork, beef and dairy, prompted widespread concern among House Agriculture Committee members. The Committee approved a revised soybean checkoff bill in October, but only after a sharp warning to all commodity groups.

"I do not believe that Congress should be enacting programs which will result in the collection of funds from all farmers for the benefit of lobbying groups which may represent the views of just a fraction of our farmers," says Rep. Dan Glickman (D., Kan.), a senior member of the House Agriculture Committee. Glickman declined to single out any of the three livestock checkoff programs now in place, but added that he has "serious questions about the relationship between some checkoff programs and the private lobbying groups which also represent those commodities."

House livestock subcommittee chairman Rep. Charles Stenholm (D., Tex.) has scheduled a hearing Dec. 7 to air complaints about the livestock checkoff programs authorized under the 1985 Farm Act.

* * *

APPENDIX I

CITATION:

The Kapital Kidd II, *Commodity checkoffs have started the kettle brewing*, HIGH PLAINS JOURNAL (Nebraska, Iowa and South Dakota Edition), Nov. 20, 1989 (relevant excerpts only).

Commodity checkoffs have started the kettle brewing

Trouble is brewing in the kettle of federally-mandated commodity research and promotion programs.

* * *

So, what is the trouble?

It is no secret that pork, beef, eggs and milk products have been getting rough treatment by the health police. Some critics contend these commodities are using checkoff funds to manipulate consumers into believing there are few, if any, diet-health concerns associated with these foods.

* * *

The dollars collected in these programs are substantial: dairy, $211 million; beef, $82 million; pork, $50 million; etc. Public and private critics contend the actual beneficiaries are the commodity organizations themselves. (A situation not hard to imagine since membership of the governing boards usually is weighted by eligibility rules favoring the specific commodity organizations.)

Legally, these funds only can be used for research and promotion: Strict statutes forbid using these checkoff funds for lobbying or supporting of trade association activities.

However, spokespersons for the major farm organizations have raised concerns over some commodity association activities, citing the ability of a commodity

association to reallocate its own research and promotion funds for off-limit uses.

* * *

APPENDIX J

CITATION:

Red Alert on Red Meat, TIME, Dec. 24, 1990, at 70 (relevant excerpts only).

Red Alert on Red Meat

With each new dietary study, eating seems to become less of a joyful experience and more of a risky business. The latest word follows that depressing pattern: researchers announced that the chances of developing colon cancer appear to rise almost in direct proportion to the amount of red meat and animal fat that people consume. That left fearful Americans grappling with the question: Is it wise to eat any red meat at all?

* * *

"The less red meat the better," says Dr. Walter Willett, professor of epidemiology and nutrition at the Harvard School of Public Health, who directed the study. "At most, it should be eaten only occasionally. And it may be maximally effective not to eat red meat at all."

* * *

APPENDIX K

CITATION:

Nutrition, SCIENCE NEWS, Feb. 19, 1994, at 126 (relevant excerpts only).

Nutrition

* * *

A new study of 14,916 male physicians links eating red meat to prostate cancer. Data from the 120 prostate malignancies that developed in study participants during the first 6 years indicated that men eating red meat five or more times a week face 2.5 times the risk of developing this cancer as men who consumed red meat once a week or less. Researchers at Harvard Medical School in Boston report their finding in the Feb. 16 JOURNAL OF THE NATIONAL CANCER INSTITUTE.

* * *

APPENDIX L

CITATION:

Vic Sussman, *A Fresh Attack On Red Meat,* U.S. News & World Report, Dec. 31, 1991, at 67 (relevant excerpts only).

A FRESH ATTACK ON RED MEAT

Hell-raiser Bart Simpson isn't talking about eating when he says, "Don't have a cow, man." But many Americans may take it that way as the medical case against meat consumption builds. Pro-meat advocates will try to poleax research promoting a near-vegetarian diet. The food fight could get messy.

Two new studies will nail the antimeat message to the kitchen door. One report, released this month by the Harvard Medical School and School of Public Health, tracked the diets of 88,751 nurses for six years and concluded that American women who eat beef, lamb or pork daily are 2½ times more likely to get colon cancer than those who eat meat less than once a month. About 1 in 20 women in the U.S. now develops the disease.

More controversial will be Cornell University's 897-page monograph *Diet, Lifestyle and Mortality in China.* The study of 6,500 Chinese, due out in January, will finger all sources of animal protein as problematic, even those from fowl, fish and dairy sources. An excess, the study contends, may dramatically raise your chance of heart disease and cancer. The sticking point is the definition of excess. The rural Chinese studied derived no more than 10 percent of their protein from animals, compared with 50 percent for Americans.

Telling numbers. It is no coincidence, the study will suggest, that the two countries' rates of cancer and heart disease contrast sharply. Only 4 in every 100,000 Chinese men die of heart disease each year, for example, compared with 67 out of 100,000 in the United States. The

Chinese surveyed ate no dairy foods and almost no meat, relying on grains, vegetables and fruits.

* * *

And if the Food and Drug Administration finds the new meat research compelling, surprising new food labels could be in the offing.

* * *

APPENDIX M

CITATION:

Texas Beef Group v. Oprah Winfrey, Civil Action Cause Number 2:96-CV-208-J, pp. 6-7 (N.D. Tex, Amarillo Div.) (Amended Order filed February 27, 1998) (relevant excerpts only).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

TEXAS BEEF GROUP, PERRYTON FEEDERS, INC., MALTESE CROSS CATTLE COMPANY, BRAVO CATTLE COMPANY, ALPHA 3 3 CATTLE COMPANY, PAUL P. ENGLER, CACTUS FEEDERS, INC., CACTUS GROWERS, INC., and DRIPPING SPRINGS CATTLE COMPANY,	§	CIVIL ACTION CAUSE NUMBER 2:96-CV-208-J
Plaintiffs,	§	
v.	§	
OPRAH WINFREY, HARPO PRODUCTIONS, INC., and HOWARD LYMAN,	§	
Defendants.	§	

AMENDED ORDER
(Filed Feb. 27, 1998)

* * *

The First Amendment and Matters of Public Concern

Any consideration of the cause of action here is governed by the First Amendment to the United States Constitution and the decisions of the courts concerning what is required to pass constitutional muster. We consider this case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York*

Times Co. V. Sullivan, 376 U.S. 254, 270 (1964). "Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First amendment values,' and is entitled to special protection." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* 472 U.S. 749, 759 (1985) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982).

The trial court is to determine whether the speech at issue in a case can "be fairly characterized as constituting speech on a matter of public concern" before further analyzing allegations of unconstitutional restrictions on speech. *Connick v. Meyers*, 461 U.S. 138, 146 (1983).

The speech in question dealt with a matter of public concern. Statements of fact and opinion on the issue of whether the feeding practices of American cattlemen on or before April 16, 1996, contributed to a danger that BSE or the deadly and incurable new variant CJD could occur in the United States, cannot be considered as anything other than a matter of legitimate public concern. It would be difficult to conceive of any topic of discussion that could be of greater concern and interest to all Americans than the safety of the food that they eat.

* * *

Accordingly, the Court GRANTS Defendants' Motion for Judgment as a Matter of Law made at the close of Plaintiffs' case on the Chapter 96, defamation, and negligence claims. The Court DENIES Defendants' motion as to the Common Law Business Disparagement claim.

It is SO ORDERED.

Signed this the 27th day of February, 1998.

/s/ Mary Lou Robinson
MARY LOU ROBINSON
UNITED STATES DISTRICT JUDGE

APPENDIX N

CITATION:

WILLIAM H. LESSER, MARKETING LIVESTOCK AND MEAT 155 (Food Products Press, 1993) (relevant sections only).

COMPONENTS OF PRICES

While actual prices may be difficult to predict, there are a number of components of these prices that are more regular and, thus, predictable. The principal factors to be considered are price spreads between several market levels and seasonality. Each will be explored in depth.

Price Spreads

Livestock producers and other farmers are regularly galled by the high and rising marketing bill. This farm-to-retail price spread increased by one-third from 1972 to 1987, or from a 38 percent to a 25 percent share of the retail food dollar going to the farmer (Figure 7-2). For livestock producers, the situation is modified a bit, with the farm share comprising 52 percent of the consumer's choice beef meat dollar in 1987 (44% for pork) (USDA *Agricultural Chartbook 1989,* Chart 125). The limited processing typical for meat products allows a greater portion of the retail value to pass through to the producer.

APPENDIX O

CITATION:

William Heffernan, Douglas Constance and Robert Gronski, Concentration of Agricultural Markets (1994) (unpublished study, University of Missouri (Columbia)) (on file with authors), (relevant portion only).

CONCENTRATION OF AGRICULTURAL MARKETS
FALL 1994

William Heffernan, Douglas Constance and
Robert Gronski Department of Rural Sociology –
University of Missouri Columbia, MO 65211
(314-882-4563)

CATTLE FEEDLOTS	Lots/Head Office	
1. Continental Grain	7 Chicago, IL	In 1989, 20 feedlots marketed more than 50% of fed beef. (*BeefWeek*, 9/90)
2. Cactus Feeders	6 Amarillo, TX	
3. ConAgra (Monfort)	4 Greeley, CO	
4. Cargill (Caprock)	7 Amarillo, TX	
5. National Farms	8 Kansas City, MO	

Source: *Feedstuffs*, 1994 Reference Issue

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(2)

Supreme Court, U.S.
FILED
DEC 14 1998
CLERK

No. 98-607

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JERRY GOETZ, D/B/A JERRY GOETZ AND SONS, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Petitioners,

v.

DAN GLICKMAN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENTS WILLIE REIBEL, RODNEY AND LARRY MENSE, JAN LYONS, KANSAS LIVESTOCK ASSOCIATION, NATIONAL CATTLEMEN'S ASSOCIATION, AND NATIONAL LIVE STOCK AND MEAT BOARD

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QUESTIONS PRESENTED

1. Whether certiorari is warranted to consider whether, as both the Tenth and Third Circuits have concluded, adoption of the Beef Promotion and Research Act was within the legislative authority of Congress under the Commerce Clause.

2. Whether certiorari is warranted to review the Tenth Circuit's determination that the assessment imposed to fund the regulatory regime adopted in the Beef Promotion and Research Act does not constitute a tax.

3. Whether certiorari is warranted to review the decision of the Tenth Circuit upholding the Beef Promotion and Research Act against a First Amendment challenge, given this Court's recent decision in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997).

4. Whether certiorari is warranted to review the determination of the Tenth Circuit that the Beef Promotion and Research Act does not violate the equal protection component of the Fifth Amendment.

RULE 29.6 STATEMENT

The corporate intervenors-respondents below were the Kansas Livestock Association, the National Cattlemen's Association ("NCA"), and the National Live Stock and Meat Board ("NLSMB"). While the case was pending in the Tenth Circuit, the Beef Industry Council ("BIC") of the NLSMB and NCA merged the functions of the BIC into the NCA and renamed the NCA the National Cattlemen's Beef Association. Each of the corporate respondents is a non-profit corporation; none has any parent companies or nonwholly owned subsidiaries.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-607

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Respondents Willie Reibel, Rodney and Larry Mense, Jan Lyons, Kansas Livestock Association, National Cattlemen's Association, and National Livestock and Meat Board respectfully request that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Tenth Circuit in this case.

INTRODUCTION

The Beef Promotion and Research Act ("the Act") requires cattle producers and importers to finance a national campaign

to promote beef sales, and thereby strengthen the Nation's cattle industry, by paying a $1 assessment on each head of cattle sold in the United States. Petitioner Jerry Goetz, a cattle producer who does not wish to pay such assessments, challenged the constitutionality of the Act on several grounds. In a virtually identical case, the Act was upheld against each of the claims raised by Goetz. *See United States* v. *Frame*, 658 F. Supp. 1476 (E.D. Pa. 1987), *aff'd*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990). The Tenth Circuit below reached the same conclusions, which are even more demonstrably correct in light of this Court's recent decision in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997).

None of the factors traditionally supporting plenary review by this Court is present. There is no conflict in the circuits on the issues presented in the petition, and petitioner in fact claims none. Nor has the Tenth Circuit decided "an important question of federal law" either "that has not been, but should be, settled by this Court," or "in a way that conflicts with relevant decisions of this Court." S. Ct. Rule 10(c). On the contrary, the Tenth Circuit's decision rests on a straightforward application of this Court's settled decisions involving the Commerce Clause, the taxing authority, the First Amendment, and the Fifth Amendment. Indeed, the First Amendment question is controlled by this Court's *Wileman* decision issued just last year.

There is, in short, no reason for this Court to grant plenary review, and the petition should be denied.

COUNTERSTATEMENT

The Statutory Scheme. The Beef Promotion and Research Act and its implementing regulations impose upon cattle producers and importers a $1 assessment on each head of cattle sold in the United States. Those assessments are used to fund the activities of two specially-created administrative bodies whose purpose is to promote the sale of beef through, among other things, the use of paid advertising. *See generally Frame*, 885 F.2d at 1122-24.

Congress' purpose in enacting the Act was to "strengthen the beef industry's position in the marketplace" through "a coordinated program of promotion and research" to be funded by "assessments on all cattle sold in the United States." 7 U.S.C. § 2901(b). Toward that end, the Act directs the Secretary of Agriculture ("the Secretary") to promulgate a "beef promotion and research order" ("the Order"). 7 U.S.C. § 2903(b). The Order and related regulations were issued by the Secretary in 1986. *See* 7 C.F.R. Part 1260.

As the Act mandates, the Order establishes two quasi-governmental bodies—the Cattlemen's Beef Promotion and Research Board ("the Cattlemen's Board" or "the Board") and the Beef Promotion Operating Committee ("the Operating Committee" or "the Committee")—to administer the program under the Secretary's supervision. 7 U.S.C. §§ 2904(1), (4)(A).

The Cattlemen's Board comprises cattle producers and importers appointed by the Secretary. 7 U.S.C. § 2904(1). The Act provides that the Cattlemen's Board shall, *inter alia*, "administer the order in accordance with its terms and provisions," "make rules and regulations to effectuate the terms and provisions of the order," and "elect members of the Board to serve on the Committee." 7 U.S.C. §§ 2904(2)(A), (B), (C).

The Committee is composed of ten members of the Board and ten members elected by a federation of state beef councils. 7 U.S.C. § 2904(4)(A). The Act directs that the Committee "shall develop plans or projects of promotion and advertising * * * which shall be paid for with assessments collected by the Board." 7 U.S.C. § 2904(4)(B).[1] Each person who purchases cattle from a cattle producer is re-

[1] The Act defines the term "promotion" to mean "any action, including paid advertising, to advance the image and desirability of beef and beef products with the express intent of improving the competitive position and stimulating sales of beef and beef products in the marketplace." 7 U.S.C. § 2902(13).

quired by the Act to collect the $1 per head assessments and remit them to the Board or a qualified state beef council. 7 U.S.C. § 2904(8)(A).

Petitioner's Allegations and Claims. Petitioner both produces and purchases cattle and accordingly is required to pay and collect assessments imposed by the Act. On October 29, 1993, the Secretary initiated proceedings against Goetz because he had not paid the required assessments. Goetz filed this action on August 2, 1994—six days before a scheduled hearing before an administrative law judge. In the district court, he alleged that he has "no desire" to associate with the Secretary, the Cattlemen's Board, the Operating Committee, or any state beef council with respect to "any matters related to the Beef Promotion Act." Complaint ¶ 35. He alleged further that he has "no desire" to "participate in, financially support, or otherwise be involved with any advertising campaign, or other promotional endeavor undertaken" in connection with the Act. Complaint ¶ 36.

For his legal claims, Goetz contended that the Act (1) exceeds Congress' power under the Commerce Clause (Complaint ¶ 40); (2) is an unconstitutional tax (Complaint ¶ 41); (3) impermissibly delegates legislative authority (Complaint ¶ 42); (4) violates the equal protection component of the Due Process Clause of the Fifth Amendment (Complaint ¶¶ 44-49); (5) violates the Takings Clause of the Fifth Amendment (Complaint ¶¶ 50-54); and (6) violates First Amendment rights of free speech, association, conscience, and belief (Complaint ¶¶ 55-79). He did not present his delegation and takings claims to the court of appeals, *see* Pet. App. 10, and we therefore do not address them further.

The Decisions Below. The district court dismissed petitioner's complaint in its entirety. In doing so, it endorsed and relied on the Third Circuit's decision in *Frame*. *See* Pet. App. 30 ("The defendant relies primarily on [*Frame*], in which the Third Circuit rejected a virtually identical challenge to the Act. This court finds the *Frame* decision persuasive and will follow it").

The district court rejected petitioner's claims that the activity being regulated does not substantially affect interstate commerce, and that Congress does not have the power under the Commerce Clause to stimulate and promote commerce. Pet. App. 31-39. It held that the assessment at issue was not a tax and therefore could not constitute an unapportioned direct tax. *Id.* at 39-40. On the First Amendment claim, the district court essentially adopted the Third Circuit's *Frame* decision, which upheld the Act's advertising requirements. *Id.* at 44. Finally, the court readily found that the Act passed muster under equal protection analysis. *Id.* at 44-46.

The Tenth Circuit affirmed. It first rejected petitioner's Commerce Clause arguments. Relying on this Court's decisions in *Hodel* v. *Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981), and *United States* v. *Lopez*, 514 U.S. 549 (1995), as well as the "well reasoned opinion of our sister circuit" in *Frame*, Pet. App. 15, the Tenth Circuit concluded that "under current Supreme Court precedent, Congress has validly exercised its commerce powers in enacting the Beef Promotion Act." *Id.* at 16. The court of appeals also found petitioner's direct tax argument wanting, concluding that the assessment was not a tax under settled precedent. *Id.* at 17-18.

The Tenth Circuit's First Amendment analysis relied on this Court's decision in *Wileman*—on which it had directed supplemental briefing. After explaining *Wileman* at some length, the court held that "under the Supreme Court's decision in *Wileman Bros.*, Goetz' First Amendment claim is fruitless." Pet. App. 20. Finally, the Tenth Circuit also endorsed the district court's application of the rational basis test to defeat petitioner's equal protection claim.

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS PRESENTED BY PETITIONER ARE NOT THE SUBJECT OF ANY CONFLICT IN THE CIRCUITS AND DO NOT REQUIRE CONSIDERATION BY THIS COURT

This Court has explained that a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals." *Braxton* v. *United States*, 500 U.S. 344, 347 (1991). *See also* S. Ct. Rule 10(a). Although petitioner has presented no fewer than four questions that he believes merit this Court's use of its certiorari jurisdiction, he does not contend *as to any one of the four issues* that the decision below conflicts with the decision of any other United States court of appeals or, for that matter, with the highest court of any state. Nor could he. As the decisions below and the petition make clear, the only other case to have considered the constitutional challenges to the Act raised by petitioner was *Frame*, and the district court and court of appeals decisions in that case squarely reject those challenges. The courts in this case *endorsed* the decisions in *Frame*. There is no conflict.

Petitioner also makes no effort to establish that the Tenth Circuit's decision involved "an important question of federal law that has not been, but should be, settled by this Court," or that it resolved "an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. Rule 10(c). The petition does not attempt to demonstrate any broader significance—other than petitioner's own dissatisfaction—in the questions on which he seeks this Court's review. There is no suggestion that the various constitutional attacks Goetz mounts on the Act are the subject of ongoing and widespread debate, either in the context of the Act itself or in analogous situations. Petitioner does not explain why the issues he presents are ones that "should be[] settled by this Court," or how the decision below "conflicts with relevant decisions of this Court." *Id.* In short, petitioner has utterly failed to demonstrate any "compelling reason" for this Court to grant certiorari. S. Ct. Rule 10.

At bottom, the petition contends only that the Tenth Circuit erred. Even if this contention were correct—and, as we demonstrate below, it assuredly is not—simple error by the court below has never been thought sufficient to warrant this Court's intervention. As Justice Harlan observed forty years ago, "[t]he fact that a case may have been wrongly decided as between the parties is not, standing alone, enough to assure certiorari." Justice Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 551 (1958), *quoted in* R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* 193 (7th ed. 1993). The petition should be denied because it fails to identify any basis for an exercise of this Court's certiorari jurisdiction.

II. THE TENTH CIRCUIT'S DECISION WAS CORRECT

None of petitioner's four constitutional attacks on the Tenth Circuit's decision has merit. Instead, it is clear that the court of appeals engaged in a straightforward and correct application of this Court's decisions to reject each of petitioner's claims.

A. The Commerce Clause. In his complaint, petitioner contended that the Beef Promotion and Research Act is not a valid exercise of Congress' commerce power because (1) the Act does not regulate any "*activity* directly or indirectly affecting interstate commerce"; (2) the Act "is not itself a *regulatory* program"; and (3) "[t]here is no rational connection between the [Act's] means * * * and [its] asserted ends." Complaint ¶ 40(c)-(e) (original emphases). The courts below considered and properly rejected each of these contentions, *see* Pet. App. 10-16; 31-39, and the petition does not squarely challenge any of the lower courts' conclusions in this regard.[2]

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[2] In the findings section of the Act, Congress determined that "beef and beef products move in interstate and foreign commerce, and beef and beef products that do not move in such channels of commerce directly burden or affect interstate commerce of beef and beef products." 7 U.S.C. § 2901(a)(6). Congress also found that "the production of beef and beef products plays a significant role in the Nation's economy." *Id.* § 2901(a)(2). These were

Instead, petitioner has substantially narrowed his Commerce Clause argument, claiming only that the Act is invalid because it does not have a public purpose. *See* Pet. at 12-13. Where, however, it is no longer disputed that the regulation at issue involves an activity that substantially affects interstate commerce, the public purpose in that regulation is grounded in the Commerce Clause itself. The very existence of the Commerce Clause among the enumerated powers of the legislature establishes that congressional regulation of activities that substantially affect interstate commerce serves a public purpose.

Congress expressly found as much when it declared that "it is in the public interest" to promote beef through a program "financ[ed] * * * through assessments on all cattle sold in the United States." 7 U.S.C. § 2901(b). Any dispute petitioner may have with the wisdom of that policy choice is a matter to be taken up with Congress, not this Court. *Cf. Hawaii Housing Auth.* v. *Midkiff*, 467 U.S. 229, 241 (1984) (under Takings Clause, "the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'") (*quoting United States* v. *Gettysburg Elec. Ry.*, 160 U.S. 668, 680 (1896)).

B. The Taxing Authority. Petitioner contends that the assessment imposed under the Act is unconstitutional because it is an unapportioned direct tax in violation of Article I, Section 9, Clause 4 of the Constitution.[3] Pet. at 13-20.

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surely reasonable conclusions on Congress' part, *see* Pet. App. 14 ("'It should be beyond dispute that beef moves in and substantially affects interstate commerce, thus making the beef industry a proper object of legislation under the commerce clause.'") (quoting Pet. App. 34); *Frame*, 658 F. Supp. at 1482 ("Clearly, the beef industry affects interstate commerce and is a proper object of congressional legislation."), and petitioner does not contend otherwise.

[3] That clause provides: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." It has been rendered largely inapplicable by virtue of the Sixteenth Amendment.

This argument fails at the threshold because the Act's assessments are not "taxes" in the constitutional sense.[4] It has been established for more than a century that if a statute's primary purpose is the regulation of commerce rather than the raising of revenue, it will not be considered a tax statute. *See, e.g., Head Money Cases*, 112 U.S. 580, 595-596 (1884).[5] Petitioner in fact agrees that this is the right test to apply, *see* Pet. 13-14 (*quoting Cities Serv. Co.* v. *Federal Energy Admin.*, 529 F.2d 1016, 1029 (Temp. Emerg. Ct. App. 1975), *cert. denied*, 426 U.S. 947 (1976), for the proposition that "if regulation is the primary purpose * * * , the mere fact that incidentally revenue is also obtained does not make the imposition a tax"), and it is the test that was applied by the courts below. *See* Pet. App. 17-18; 39-40.

Thus, petitioner complains only about the application of settled law to the facts of this case—hardly the sort of issue that merits this Court's attention. *See* S. Ct. Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law."). In any event, there can be no doubt that the primary purpose behind the Act is regulatory rather than revenue-raising. Congress declared in the statute itself that its "policy" was to establish a "program of promotion and research designed to strengthen the beef industry's position in the marketplace" and to "financ[e]" that program

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[4] Petitioner's claim that "the district court's opinion in *Frame* rested almost entirely upon the premise that the [assessment] is a tax," Pet. 16, is incorrect. That court only "[a]ssum[ed], *arguendo*, that the Act is an exercise of Congress' taxing power." 658 F. Supp. at 1479. Furthermore, the party challenging the Beef Promotion Act in *Frame* abandoned before the Third Circuit the claim that the assessments were a tax. 885 F.2d at 1125 n.4.

[5] *See also Brock* v. *WMATA*, 796 F.2d 481, 488 (D.C. Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987); *South Carolina* v. *Block*, 717 F.2d 874, 887 (4th Cir. 1983), *cert. denied*, 465 U.S. 1080 (1984); *Moon* v. *Freeman*, 379 F.2d 382, 391-392 (9th Cir. 1967); *United States* v. *Stangland*, 242 F.2d 843, 848 (7th Cir. 1957); *Rodgers* v. *United States*, 138 F.2d 992, 994-995 (6th Cir. 1943).

through assessments on cattle sales. 7 U.S.C. § 2901(b). Thus, the overriding purpose of the Act is the clearly regulatory goal of beef promotion; the assessment provisions merely serve that end. *See Frame*, 885 F.2d at 1134, 1135 (congressional interest served by the Act is "preventing further decay of an already deteriorating beef industry" while the assessments provide "[t]he vehicle for funding" the Act). The Act's assessments simply are not "taxes" in the relevant sense.

Petitioner's arguments to the contrary are wide of the mark. He first cites instances in the congressional debate when individual members of Congress referred to the assessment as a tax, Pet. 14-15, but there is no evidence that these members were doing anything other than employing a colloquial shorthand for the proposed assessment. Nor were the members considering whether the proposal involved a tax subject to constitutional limitations—a question on which their views would, in any event, not be controlling. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

Petitioner's reliance on the flow of funds collected under the assessment, Pet. 15-16, is equally unavailing. Contrary to petitioner's suggestion, the fact that the funds at issue flow not to the Treasury but to the Board and/or to state beef councils is strong evidence that the assessment is *not* a tax. Like the funds at issue in the *Head Money Cases*, the assessments are "appropriated in advance to the uses of the statute, and do[] not go to the general support of the government." 112 U.S. at 596. *See also United States* v. *Munoz-Flores*, 495 U.S. 385, 400 (1990) ("a bill creating a discrete governmental program and providing sources for its financial support is not a revenue bill simply because it creates revenue"). The courts below correctly concluded that the assessment under the Act is not a tax subject to the constitutional limitations on taxation. Nothing in the petition establishes that there is any occasion for this Court to review that determination.

C. The First Amendment. The Court's *Wileman* decision fully disposes of petitioner's First Amendment claim, and Goetz offers no reason for the Court to revisit its recent decision in *Wileman*.

The Court granted certiorari in *Wileman* for the express purpose of resolving the conflict between the Ninth Circuit's decision in that case, which held that assessments on growers, handlers, and processors of California tree fruits to support generic advertising of those fruits violated the First Amendment, and the Third Circuit's decision in *Frame*. *See Wileman*, 117 S. Ct. at 2137. The Court held that such generic commodity advertising programs did not violate the First Amendment rights of those compelled to support them, resolving the conflict by reversing the Ninth Circuit. The Court's disposition makes it clear that the program at issue in *Frame*—the same program challenged by petitioner in this case—passes constitutional muster under the First Amendment.

Petitioner stresses the differences between the program considered in *Wileman* and that at issue here, and there are of course differences between the programs. Those differences, however, are unrelated to the factors this Court considered pertinent in *Wileman* when it held that mandatory generic advertisement programs do not violate the First Amendment. As the Court explained:

> Three characteristics of the regulatory scheme at issue distinguish it from laws that we have found to abridge the freedom of speech protected by the First Amendment. First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views. [*Id.* at 2138 (footnotes omitted).]

These three characteristics of the program in *Wileman*—which the Court found determinative in upholding its constitutionality—are also present in this case:

First, the Act does not restrict Goetz—or anyone else—from conveying any message to anybody, and Goetz does not contend otherwise.

Second, the Act does not compel Goetz—or anyone else—to engage in any actual or symbolic speech. Like those subject to the program upheld in *Wileman*, Goetz and other cattlemen subject to the Beef Promotion and Research Act "are not required themselves to speak, but are merely required to make contributions for advertising." *Id.* at 2139.

Third, while the Act compels producers to support generic advertising of the commodity they market, it does "not compel the producers to endorse or to finance any political or ideological views." *Id.* at 2138. Indeed, the Act expressly prohibits any use of assessment funds for political purposes, *see* 7 U.S.C. § 2904(10), and, as the *Frame* court explained, "[t]he purpose underlying the Beef Promotion Act is ideologically neutral. The federal government seeks to bolster the image of beef solely to increase sales; it harbors no intent to 'prescribe orthodoxy.'" 885 F.2d at 1135. *Compare Wileman*, 117 S. Ct. at 2139-40 ("requiring respondents to pay the assessments cannot be said to engender any crisis of conscience. None of the advertising in this record promotes any particular message other than encouraging consumers to buy California's tree fruit").

Petitioner claims that the Act does compel him to finance ideological views because the advertising conveys the view that "consumption of beef is healthy and desirable in the face of contrary medical evidence." Pet. 22. In rejecting similar claims in *Wileman*, the Court held that respondents' "disagreement with particular messages" has "no bearing on the validity of the entire program." 117 S. Ct. at 2137. *See also id.* at nn. 10 & 11. Instead, the Court noted that "our cases provide affirmative support for the proposition that assessments to fund a lawful collective program may some-

times be used to pay for speech over the objection of some members of the group." *Id.* at 2140 (*citing Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507 (1991)). In any event, petitioner pointedly does *not* claim in his petition to disagree with the views expressed in the advertising at issue, and thus, even if the advertising were considered to involve ideological issues, the assessments would not "require [him] to use [his] own property to convey an *antagonistic* ideological message." *Wileman*, 117 S. Ct. at 2139 (emphasis added).

In short, this case is indistinguishable from *Wileman* on the grounds on which the Court relied in upholding the commodity promotion program at issue in that case. *Wileman* thus controls petitioner's First Amendment claim, and there is no reason to revisit that decision one year after it was issued. Even if there were pertinent differences between the program at issue in *Wileman* and the beef promotion program at issue here, petitioner offers no "compelling reason," S. Ct. Rule 10, for the Court to undertake consideration of the application of *Wileman* to various individual commodity promotion programs on a case-by-case basis. [6]

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[6] Even if *Wileman* were for some reason distinguishable from this case—which it is not—that would *not* compel the conclusion that the Act is unconstitutional. We argued alternatively below that the speech at issue is government speech and therefore not subject to First Amendment challenge. *See* Brief for Intervenors-Appellees 14-26. This Court in *Wileman* did not consider a government speech argument. *See* 117 S. Ct. at 2145 n.2 (Souter, J., dissenting) (noting that the Secretary of Agriculture had waived the argument that "the advertisements at issue represent so-called 'government speech,' with respect to which the government may have greater latitude in selecting content than otherwise permissible under the First Amendment") (*citing Keller* v. *State Bar of Cal.*, 496 U.S. 1 (1990), and *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 259 n.13 (1977) (Powell, J., concurring in the judgment)). In this case, that argument has been expressly raised and preserved below. Therefore, that issue would remain to be decided if Goetz's First Amendment challenge to the Beef Promotion and Research Act were not foreclosed on the basis of *Wileman*.

D. Equal Protection. There is no need to discuss petitioner's equal protection claim at any length. Petitioner's bid for strict scrutiny rests completely on his First Amendment claim, which was properly rejected by the Tenth Circuit for the reasons discussed above. Rather than burdening free speech rights and being subjected to strict scrutiny, the Act is a classic example of legislation that adjusts the benefits and burdens of economic life and need only be shown to have a rational basis to pass muster under the Fifth Amendment. *See FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993); *National R.R. Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 470 U.S. 451, 476-477 (1985). The Tenth Circuit's determination that the Act satisfies the rational basis test involves no issue of any broader significance, is plainly correct, and provides no occasion for this Court to exercise its certiorari jurisdiction.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

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No. 98-607

In the Supreme Court of the United States

OCTOBER TERM, 1998

JERRY GOETZ, DBA JERRY GOETZ AND SONS, ETC.,
PETITIONER

v.

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Beef Promotion and Research Act is a permissible exercise of Congress's authority under the Commerce Clause.

2. Whether the Beef Promotion and Research Act implicates the constitutional restrictions on Congress's exercise of the taxing power.

3. Whether the Beef Promotion and Research Act is consistent with the First Amendment.

4. Whether the Beef Promotion and Research Act is consistent with the equal protection component of the Fifth Amendment.

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DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 149 F.3d 1131. The opinion of the district court (Pet. App. 24-46) is reported at 920 F. Supp. 1173.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1998. The petition for a writ of certiorari was filed on October 8, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Beef Promotion and Research Act of 1985, Pub. L. No. 99-198, Title XVI, 99 Stat. 1597 (codified at 7 U.S.C. 2901-2911) (the Act), in order to establish "a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products." 7 U.S.C. 2901(b). The Act reflects Congress's conclusion that "the maintenance and expansion of existing markets for beef and beef products are vital to the welfare of beef producers and those concerned with marketing, using, and producing beef products, as well as to the general economy of the Nation." 7 U.S.C. 2901(a)(4).

As directed by the Act, the Secretary of Agriculture promulgated, after notice and comment, a Beef Promotion and Research Order. The Order establishes two entities: the Cattlemen's Beef Promotion and Research Board (the Cattlemen's Board), composed of cattle producers and importers appointed by the Secretary, and the Beef Promotion Operating Committee (the Operating Committee), composed of ten members of the Cattlemen's Board and ten members elected by a federation that includes qualified state beef councils. 7 U.S.C. 2903(a) and (b), 2904(1) and (4)(A); 7 C.F.R. 1260.141, 1260.161.[1]

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[1] A "qualified State beef council" is defined in the Act as "a beef promotion entity that is authorized by State statute or is organized and operating within a State, that receives voluntary contributions and conducts beef promotion, research, and consumer information programs, and that is recognized by the Board as the beef promotion entity within such State." 7 U.S.C. 2902(14).

The Operating Committee, on behalf of the Cattlemen's Board, develops and implements "promotion, research, consumer information and industry information plans or projects," subject to the approval of the Secretary of Agriculture. 7 U.S.C. 2904(4)(B); 7 C.F.R. 1260.168(d) and (e). That activity is funded by a $1 per head assessment on all cattle sold in the United States or imported into the United States. The assessment is collected by the person who pays a cattle producer for cattle. It is remitted directly to the Cattlemen's Board or to a qualified state beef council (which, in turn, remits money to the Cattlemen's Board). 7 U.S.C. 2904(8)(A)-(C); 7 C.F.R. 1260.172(a)(1), 1260.310, 1260.311(a), 1260.312(c). The assessment cannot be used for any political purpose "with the exception of recommending amendments to the [Beef Promotion and Research Order]." 7 U.S.C. 2904(10); see also 7 C.F.R. 1260.169(e) (implementing provision), 1260.181(b)(7) (state beef councils cannot use funds in a manner inconsistent with this provision).

On May 10, 1988, the Secretary of Agriculture, as required by the Act, submitted the Beef Promotion and Research Order to a nationwide referendum among cattle producers and importers. See 7 U.S.C. 2906(a).[2] The Order was approved by a majority vote. It remains in force today. Pet. App. 5. The Secretary may, however, conduct additional referenda upon the request of at least ten percent of cattle producers. 7 U.S.C. 2906(b).

The Secretary of Agriculture is authorized to investigate violations of the Act, 7 U.S.C. 2909; to issue

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[2] Before the referendum, a cattle producer who paid the assessment could demand a one-time refund of assessments paid up to that date. 7 U.S.C. 2907(c).

an order restraining or preventing a person from violating the Act or the Beef Promotion and Research Order and to assess a civil penalty of not more than $5,000 per violation, 7 U.S.C. 2908(a); and to request that the Attorney General initiate a civil enforcement action in federal district court, 7 U.S.C. 2908(b) and (c).

2. Petitioner Jerry Goetz is a Kansas cattle producer, buyer, and trader who is subject to the assessment and collection provisions of the Act. He brought the present suit challenging the constitutionality of the Act after the Secretary of Agriculture initiated administrative proceedings against him under 7 U.S.C. 2908(a) for failure to comply with the Act. He contended that the Act exceeds Congress's authority under the Commerce Clause of the Constitution, Art. I, § 8, Cl. 3, imposes an unconstitutional direct tax, constitutes an unlawful delegation of taxing and spending powers, amounts to a taking of property without just compensation, and violates the First Amendment and the equal protection component of the Fifth Amendment. Pet. App. 5-7, 30.

The district court upheld the Act, relying largely on the reasoning of *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990). Pet. App. 24-46. In *Frame*, the Third Circuit rejected challenges to the Act under the Commerce Clause, the Just Compensation Clause, the First Amendment, and the equal protection component of the Fifth Amendment.

3. The court of appeals affirmed. Pet. App. 1-23.

First, the court of appeals, applying the analytical framework articulated in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981), held that the Act is a valid exercise of Congress's authority under the Commerce Clause. The court determined that "Congress had a rational basis for

finding the beef industry substantially affects interstate commerce." Pet. App. 14; see *id.* at 12-13 (quoting findings set forth at 7 U.S.C. 2901(a)). The court held that Congress's objective in the Act—to strengthen the beef industry—involves a "proper regulatory activity." *Id.* at 14-15. And the court held that the means chosen by Congress in the Act—promotion, advertising, research, consumer information, and industry information—are "rationally related to the maintenance and expansion of the nation's beef markets." *Id.* at 16 (quoting *Frame*, 885 F.2d at 1127).

Second, the court of appeals held that the assessment imposed by the Act is not a tax, within the meaning of the Constitution, because the primary purpose of the assessment is regulation, not raising revenues. The court therefore concluded that the assessment is not subject to constitutional constraints on Congress's exercise of the taxing power. Pet. App. 17-18 (citing *Rodgers* v. *United States*, 138 F.2d 992, 994 (6th Cir. 1943)).

Third, the court of appeals rejected petitioner's First Amendment challenge to the assessments on the authority of *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). The court noted that *Wileman Bros.* held, contrary to petitioner's position in this case, that no First Amendment issue is presented by mandatory assessments to support generic advertising programs for agricultural products. Pet. App. 19-20.

Finally, the court of appeals held that the Act does not violate the equal protection component of the Fifth Amendment by imposing an assessment only on the initial sale of cattle and not on subsequent transactions. The court held that the Act is subject to equal protection scrutiny under the rational basis standard, because the Act does not infringe upon a fundamental

right or discriminate against a suspect class. The court further held that the Act "easily survives" rational basis review. Pet. App. 22-23. The court recited, with approval, the Third Circuit's reasoning in *Frame* as to why Congress may rationally have chosen to impose the assessment on the initial sale of cattle: "(1) an assessment on the initial sale of cattle is easier to administer; (2) ranchers would be most benefitted by the Act; and (3) ranchers could pass the cost on to others." *Id.* at 23 (citing *Frame*, 885 F.2d at 1137-1138).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other circuit. The decision is consistent with *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), with respect to the First Amendment claims and is consistent with *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990), with respect to the Commerce Clause and equal protection claims. No reason exists for this Court to revisit the constitutionality of federal programs requiring the producers or distributors of an agricultural product to share the costs of its generic advertising. Indeed, the Court only recently denied a petition for a writ of certiorari in another case raising such issues. *Cal-Almond, Inc.* v. *Department of Agriculture*, 119 S. Ct. 57 (1998).

1. The Beef Promotion and Research Act is a valid exercise of Congress's authority under the Commerce Clause. This Court has held that an Act of Congress adopted pursuant to the Commerce Clause may be invalidated "only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no

reasonable connection between the regulatory means selected and the asserted ends." *Hodel* v. *Indiana*, 452 U.S. 314, 323-324 (1981). As recognized by the courts below and by the Third Circuit in *Frame*, the Act readily satisfies that standard. See Pet. App. 10-16, 31-39; *Frame*, 885 F.2d at 1125-1127.

Congress made extensive findings in the Beef Promotion and Research Act that the production and sale of beef affect interstate commerce: that "beef and beef products move in interstate and foreign commerce," that "the production of beef and beef products plays a significant role in the Nation's economy," and that "the maintenance and expansion of existing markets for beef and beef products are vital to the welfare of beef producers * * * as well as to the general economy of the Nation." 7 U.S.C. 2901(a). The court of appeals correctly held, in accordance with the analysis articulated in *Hodel*, that "Congress had a rational basis" for those findings. Pet. App. 14. The court of appeals also correctly held, in accordance with *Hodel*, that a "rational connection" exists between the Act's "asserted end" (the strengthening of the beef industry) and its "regulatory means" (the advertising and promotion of beef and beef products). *Id.* at 16; cf. *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993) (recognizing that Congress is entitled to legislate on the premise that "advertising of [a product] serves to increase the demand for the advertised product").

Petitioner does not dispute that *Hodel* sets forth the proper legal standard for determining whether the Beef Promotion and Research Act is a permissible exercise of Congress's authority under the Commerce Clause. Nor does petitioner challenge the reasonableness of the findings that the Congress made in passing the Act. Instead, petitioner's contention that the Act is not "a

valid regulation of interstate commerce under the Commerce Clause" rests principally on the Act's provisions for qualified state beef councils, such as the Kansas Beef Council, to retain 50 cents of each $1 assessment that they collect (while forwarding the remainder to the Cattlemen's Board). Pet. 12-13.

Congress was entitled to conclude, however, that some of the activities contemplated by the Beef Promotion and Research Act should be conducted at the state level though already established organizations. See 7 U.S.C. 2901(a)(5) (recognizing that "there exist established State and national organizations conducting beef promotion, research, and consumer education programs that are invaluable to the efforts of promoting the consumption of beef and beef products"). The funds retained by the qualified state beef councils are not, as petitioner asserts (Pet. 12), "outside of the scope of [the Act]." Those funds must be used by the councils to advance the objectives of the Act. The councils are required to conduct research and promotion activities of the sort specified in the Act, are prohibited from using assessment funds for activities barred by the Act, and are required to report annually to the Cattlemen's Board and the Secretary on their use of assessment funds. 7 C.F.R. 1260.181; see also 7 U.S.C. 2902(14). And, in any event, a regulatory program such as that created by the Act "can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal." *Hodel*, 452 U.S. at 329 n.17.[3]

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[3] Petitioner also suggests (Pet. 12-13) that the Beef Promotion and Research Act does not serve a "public good" because some of the assessment funds are turned over to "private trade association[s]." But Congress expressly concluded otherwise. See 7

2. The $1 assessment per head of cattle sold is not subject to any constitutional restriction on the taxing power, including the restriction relied upon by petitioner that direct taxes be apportioned among the States "according to their respective Numbers." See U.S. Const. Art. I, § 2, Cl. 3. The taxing power and the commerce power are distinct sources of constitutional power, and "the limitations of one cannot be read into the other." *Richfield Oil Corp.* v. *State Bd. of Equalization*, 329 U.S. 69, 76 (1946). Congress adopted the Beef Promotion and Research Act pursuant to the power conferred by the Commerce Clause. See 7 U.S.C. 2901(a)(6) ("beef and beef products move in interstate and foreign commerce, and beef and beef products that do not move in such channels of commerce directly burden or affect interstate commerce of beef and beef products"). It is thus of no consequence whether the Act satisfies the requirements for statutes enacted under the power to levy and collect taxes. See U.S. Const. Art. I, § 8, Cl. 1.

Nor is the assessment a "tax" in the constitutional sense. In order to ascertain whether the assessment is a tax, the court of appeals inquired whether the "primary purpose" of the Beef Promotion and Research Act is "regulation" or "revenue." Pet. App. 17-18 (quoting *Rodgers* v. *United States*, 138 F.2d 992, 994 (6th Cir. 1943)). That analysis is consistent with the decisions of this Court and other courts of appeals. See, *e.g.*, *The Head Money Cases*, 112 U.S. 580, 595-596 (1884) (a 50-cent charge imposed on ship owners for each immigrant

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U.S.C. 2901(b) (stating that the "coordinated program of promotion and research" created by the Act "is in the public interest"). Petitioner has not offered any basis for disagreeing with that congressional judgment.

transported to a U.S. port was not "a tax or duty within the meaning of the Constitution," because the charge was "an expedient regulation of commerce by Congress" that did "not go to the general support of the government"); *South Carolina* v. *Block*, 717 F.2d 874, 887 (4th Cir. 1983) (applying the rule that, "[i]f regulation is the primary purpose of a statute, revenue raised under the statute will be considered a fee rather than a tax," to hold that a 50-cent deduction imposed by the Secretary of Agriculture on proceeds of commercially sold milk was not a "tax" for constitutional purposes), cert. denied, 465 U.S. 1080 (1984); *Rodgers*, 138 F.2d at 994 ("if regulation is the primary purpose of the statute, the mere fact that incidentally revenue is also obtained does not make the imposition a tax").[4]

Petitioner does not challenge the legal standard on which the court of appeals relied in concluding that the assessment is not a tax. See Pet. 13-14 (quoting standard articulated in *Rodgers*). He merely challenges the application of that standard to the Beef Promotion and Research Act. But this Court ordinarily does not grant certiorari to review the application of settled legal standards to particular situations. See Sup. Ct. R. 10.

The "primary purpose" of the Beef Promotion and Research Act is not "to raise revenue," as petitioner contends (Pet. 16), but to establish and conduct a regulatory program for generic advertising, promotion, and research designed to strengthen the beef industry.

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[4] Cf. *Brock* v. *Washington Metropolitan Area Transit Authority*, 796 F.2d 481, 488-489 (D.C. Cir. 1986) (Ginsburg, J.) (assessment for workers' compensation fund was not a "tax," from which the transit authority was exempt under its compact, because "the 'primary purpose' of the [workers' compensation statute] is regulation, not the raising of revenue"), cert. denied, 481 U.S. 1013 (1987).

See Pet. App. 18; 7 U.S.C. 2901(b). The funding of that specialized program, by assessments on those who benefit most from it, is merely incidental to its establishment. This Court has recognized that "a bill creating a discrete governmental program and providing sources for its financial support is not a revenue bill simply because it creates revenue." *United States* v. *Munoz-Flores*, 495 U.S. 385, 400 (1990).[5]

Petitioner offers no principled basis to distinguish the assessment at issue here from the assessment in *The Head Money Cases*. Those cases involved a challenge to a statute that imposed a charge on ship owners in order to create a fund "to defray the expense of regulating immigration" and "for the care of immigrants arriving in the United States." 112 U.S. at 590. Under petitioner's reasoning, the "primary purpose" of that statute, like the Act at issue here, would be the "imposition of the assessment." Pet. 15. But this Court recognized otherwise in concluding that the statute was not a tax but a regulatory measure. 112 U.S. at 595-596. No justification exists for reaching a contrary conclusion in this case.[6]

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[5] Petitioner notes (Pet. 14) the use of the term "tax" by a few Members of Congress to refer to the assessment. But there is no reason to conclude that any of those Members, much less the Congress as a whole, was expressing any view on whether the assessment would constitute a tax as that term is used in the Constitution. Cf. *The Head Money Cases*, 112 U.S. at 596 (recognizing that an "act is not void, because, within a loose and more extended sense than was used in the Constitution, it is called a tax").

[6] Because the assessment is not a tax at all, this Court, like the court of appeals, need not consider petitioner's arguments (Pet. 17-20) that the asserted tax is a direct one that violates the apportionment requirement.

3. This Court's recent decision in *Wileman Bros.* is dispositive of petitioner's First Amendment challenge to the Beef Promotion and Research Act. In *Wileman Bros.*, the Court held that regulations imposing a generic advertising program for California peaches, nectarines, and plums, paid for by mandatory assessments on handlers of the fruit, did not implicate the First Amendment. The Court identified three factors that distinguish such generic advertising programs from laws that abridge freedom of speech in violation of the First Amendment. First, generic advertising programs "impose no restraint on the freedom of any producer to communicate any message to any audience." 117 S. Ct. at 2138. Second, generic advertising programs "do not compel any person to engage in any actual or symbolic speech," because persons "are not required themselves to speak, but are merely required to make contributions for advertising." *Id.* at 2138-2139. And third, generic advertising programs "do not compel the producers to endorse or to finance any political or ideological views." *Id.* at 2138. The Court explained that requiring the members of an industry to pay assessments for generic advertising, which does not promote "any particular message other than encouraging consumers to buy [their product]," does not "engender any crisis of conscience" or otherwise interfere with any "freedom of belief." *Id.* at 2139-2140 (quoting *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977)).

The First Amendment issues here are virtually identical to those resolved in *Wileman Bros.* Although, as petitioner notes (Pet. 21), the generic advertising program in *Wileman Bros.* was established pursuant to a marketing order while the generic advertising program in this case was established pursuant to a statute, the two programs are indistinguishable for First

Amendment purposes. Both generic advertising programs are part of larger regulatory schemes for research and promotion of their respective commodities. Compare 7 U.S.C. 608c(6)(I) with 7 U.S.C. 2904(4)(B). Both generic advertising programs are implemented by committees of individuals in their respective industries and funded by assessments paid by members of those industries. Compare 7 U.S.C. 608c(6)(I), 610(b)(2)(ii) with 7 U.S.C. 2904(8)(A)-(C). And, like the marketing order in *Wileman Bros.*, 117 S. Ct. at 2134-2135 & n.3, the Beef Promotion and Research Act contains a mechanism by which cattle producers can express their disapproval of the generic advertising program. See 7 U.S.C. 2906(b) (Secretary of Agriculture may conduct referenda upon request of ten percent of cattle producers).[7]

Petitioner attempts to distinguish *Wileman Bros.* on the ground that generic beef advertising, in contrast to generic fruit advertising, involves the expression of "ideological views," specifically, that "the consumption of beef is healthy and desirable in the face of contrary medical evidence." Pet. 21-22.[8] The Third Circuit rejected similar arguments in *Frame*, concluding that

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[7] Indeed, this Court appears to have recognized the similarity, for purposes of First Amendment analysis, between the generic advertising programs in *Wileman Bros.* and in this case. In *Wileman Bros.*, the Court noted that the Ninth Circuit's decision in that case was "in conflict" with the Third Circuit's decision in *Frame*, which, like this case, involved a First Amendment challenge to the generic advertising program established by the Beef Promotion and Research Act. 117 S. Ct. 2137.

[8] Similar arguments about the "ideological" aspects of generic advertising of agricultural products, including beef, were asserted in *Wileman Bros.* See, *e.g.*, Br. of Resp. Gerawan Framing, Inc., et al. at 46-49.

"[t]he purpose underlying the Beef Promotion Act is ideologically neutral." 885 F.2d at 1135. Petitioner offers no authority to support his broad definition of ideological speech, under which any conceivable statement, regardless of its political content, is "ideological" as long as someone disagrees with it. Cf. *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 507 (1981) (plurality opinion) (noting "the difference between commercial price and product advertising and ideological communication") (citing *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 69 n.32 (1976)). And, even if one assumes *arguendo* that generic advertising promoting beef and beef products expresses a particular ideology, there is no reason to suppose that any member of the beef industry who is subject to the assessment does not generally share that ideology. See *Wileman Bros.*, 117 S. Ct. at 2138 ("since all of the respondents are engaged in the business of marketing California nectarines, plums, and peaches, it is fair to presume that they agree with the central message of the speech that is generated by the generic program"). Nor does anything in the Act prevent petitioner, or any other member of the beef industry, from expressing the view that the consumption of beef is *not* healthy and desirable.

In sum, *Wileman Bros.* makes plain that generic advertising programs such as the one at issue here do not implicate any First Amendment issue. There is accordingly no basis, as petitioner argues, for subjecting the Beef Promotion and Research Act to further scrutiny under the test set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 564 (1980). As the Court made clear in *Wileman Bros.*, *Central Hudson*, a case involving a *restriction* on commercial speech, is inapplicable in

cases, such as this one, involving *compelled funding* of commercial speech. See 117 S. Ct. at 2141 ("It was therefore error for the Court of Appeals to rely on *Central Hudson* for the purpose of testing the constitutionality of market order assessments for promotional advertising.").[9]

4. Finally, the Beef Promotion and Research Act comports with the equal protection component of the Fifth Amendment. Contrary to petitioner's assertions (Pet. 23), there is no basis for subjecting the Act to strict scrutiny, because the Act does not involve any legislative classification that operates to the disadvantage of a suspect class or interferes with the exercise of a fundamental right. *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 312 (1976). As explained above, the Act does not infringe upon any free speech rights. Nor does the Act categorize individuals on the basis of a suspect characteristic such as race. The Act merely makes an economic distinction and, accordingly, need only be rationally related to a legitimate governmental interest in order to satisfy equal protection. *United States* v. *Sperry Corp.*, 493 U.S. 52, 65 (1989) (rationality standard applies to a classification for assessing fees that "neither burdens fundamental constitutional rights nor creates suspect classifications").

As recognized by the Tenth Circuit in this case and the Third Circuit in *Frame*, the Beef Promotion and Research Act easily satisfies the rational basis test. Pet. App. 23; *Frame*, 885 F.2d at 1138. Congress's

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[9] Nor does this case involve infringements on the right to associate for expressive purposes. There is thus no reason to accept petitioner's invitation (Pet. 23) to apply the standard of review articulated in *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984).

interest in strengthening the beef industry is undoubtedly "legitimate," given Congress's recognition that "the production of beef and beef products plays a significant role in the Nation's economy." 7 U.S.C. 2901(a)(2). The assessment is rationally related to that interest because it is used to fund promotion and advertising, which affect demand by increasing beef consumption and expanding the markets for beef and beef products. See H.R. Rep. No. 271, 99th Cong., 1st Sess., Pt. 1, at 190 (1985) (recognizing "the value of promotion and advertising in improving the incomes of United States farmers by enhancing the markets for their products"); see also *Wileman Bros.*, 117 S. Ct. at 2141 (recognizing that "[g]eneric advertising [that] is intended to stimulate consumer demand for an agricultural product" serves purposes that are "legitimate" and "consistent with the regulatory goals of the overall statutory scheme" of strengthening an agricultural industry); *Edge Broadcasting*, 509 U.S. at 434 (noting nexus between advertising and demand).

Petitioner's criticisms (Pet. 24-26) of the regulatory scheme created by the Beef Promotion and Research Act do not undermine that equal protection analysis. The fact that others in the beef industry, such as packers and promoters, do not pay or collect the assessment is irrelevant. Congress could reasonably have concluded that those members of the beef industry who have the most to gain from the generic advertising program should also bear its costs. Petitioner's assertion (Pet. 24-25) that 52 percent of beef consumers' choice meat dollars go to beef producers simply confirms that producers are the primary beneficiaries of the increases in consumption that Congress sought to achieve through the Act. Similarly, the fact that the beef industry includes several large corporate pro-

ducers (Pet. 25) does not negate the benefits of the regulatory scheme that inure to small producers and that help to preserve the "American cattlemen's traditional way of life." *Frame*, 885 F.2d at 1135. Finally, the referendum and refund provisions do not, as petitioner suggests (Pet. 26), indicate that Congress's interest in promoting the consumption of beef was insubstantial. Those provisions simply reflect Congress's understanding that, "[i]f the beef promotional program is to succeed, the program will need input and support from the beef industry, before and after implementation of the program." S. Rep. No. 145, 99th Cong., 1st Sess. 334 (1985).

In short, like the marketing orders at issue in *Wileman Bros.*, the Beef Promotion and Research Act

> is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers "do not wish to foster" generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.

Wileman Bros., 117 S. Ct. at 2142. The Tenth Circuit correctly held that the Act is constitutional. Petitioner has offered no persuasive reason for this Court to review that determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1998

JERRY GOETZ, d/b/a JERRY GOETZ AND SONS, individually and on behalf of others similarly situated,

Petitioner,

v.

DAN GLICKMAN, Secretary, United States Department of Agriculture; WILLIE REIBEL; RODNEY and LARRY MENSE; JAN LYONS; KANSAS LIVESTOCK ASSOCIATION; NATIONAL CATTLEMEN'S ASSOCIATION; and, NATIONAL LIVESTOCK AND MEAT BOARD;

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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QUESTIONS PRESENTED

The questions presented herein are:

1. Do the QSBCs[1] spend the assessment funds which they retain outside of the scope of the BPA?[2]

2. Do the decisions of the district court and of the court of appeals in *Frame*[3] reject Goetz's argument that the BPA is a tax?

3. Did Congress ever intend the BPA to be a regulation of interstate commerce?

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[1] "QSBCs" is the abbreviation used herein for qualified State beef councils.

[2] "BPA" is the abbreviation used herein for the Beef Promotion and Research Act of 1985 ("BPA"), 7 U.S.C. §§ 2901-2911 (1997).

[3] The complete citation to *Frame* is *U.S. v. Frame*, 658 F.Supp. 1476 (E.D. Penn. 1987), *aff'd*, 885 F.2d 1119 (3rd Cir 1989), *cert. denied*, 493 U.S. 1094 (1990).

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ARGUMENTS

I. The QSBCs Spend the Assessment Funds Which They Retain Outside of the Scope of the BPA.

In Glickman's Opposition, Glickman makes the following statements:

> The funds retained by the qualified state beef councils are not, as petitioner asserts (Pet. 12), "outside of the scope of [the Act]." Those funds must be used by the councils to advance the objectives of the Act.

Glickman's Opp. at 8. These statements are untrue.[4] There is absolutely no requirement contained in the BPA, the Order, or any of the rules and regulations thereunder which dictates that the $.50 of each $1.00 retained by the QSBCs from the funds collected from the assessment imposed by the BPA be used to advance the objectives of the BPA. In fact, there is no requirement that QSBCs even expend such funds on beef promotion or research at all. In the hope of avoiding or overcoming this observation, Glickman points to three requirements of the BPA and the Order which he believes support his position. *Id.* The following is a closer look at each of these requirements.

To start with, Glickman points out that a QSBC must conduct research and promotion activities of the sort specified in the BPA as a prerequisite to qualifying for certification as a QSBC. *Id.* This is true. *See* 7 U.S.C.

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[4] In itself, the fact that Glickman is unable to provide a citation to any provision of the BPA, the Order, or to any rule or regulation thereunder which directly supports the proposition set forth in the second sentence of the foregoing quotation is telling.

§ 2902(14); 7 C.F.R. § 1260.181(b)(1). However, this prerequisite to certification does not restrict the QSBCs from being involved in additional activities totally unrelated to beef promotion and research. Furthermore, such prerequisite to certification does not even require that QSBCs expend any of the assessment funds they retain under the BPA on beef promotion and research activities.

Glickman then points out that QSBC are prohibited from using assessment funds which they retain for activities barred by the BPA. *Glickman's Opp.* at 8. Only two such prohibitions exist. *See Goetz's Pet.* at 12; 7 C.F.R. § 1260.181(b)(7). The first of these restrictions is that QSBCs are not allowed to use assessment funds which they retain "for the purpose of influencing governmental policy or action." *Id.* This is hardly a restriction. QSBCs can easily reallocate other funds available to them for such off-limit uses. *See Goetz's Pet.* at App. 92-93. In this manner, assessment funds retained by QSBCs actually enable QSBCs to increase the amounts which they spend on influencing governmental policy or action in spite of this restriction. The second of these restrictions is that QSBCs are not allowed to use assessment funds which they retain "to fund plans or projects which make use of any unfair or deceptive acts or practices including unfair or deceptive acts or practices with respect to the quality, value or use of any competing product." 7 C.F.R. § 1260.181(b)(7). Once again, this is hardly a restriction. This is nothing more than is already required by state and federal truth-in-advertising laws.

Finally, Glickman asserts that QSBCs are required to report annually to the Board and the Secretary on their use of assessment funds. *Glickman's Opp.* at 8. This is not

true. The Order requires that each QSBC furnish the Board with an annual report by a certified public accountant showing all funds remitted to such QSBC by collecting persons and producers under the BPA. *See* 7 C.F.R. § 1260.181(b)(6). Such report is not a disclosure of how each QSBC expended the assessment funds which it retained. Rather, it is an independent accounting of the total of all $1.00 assessments remitted to such QSBC by collecting persons and producers under the BPA during the year for which such report is prepared. From this report, the Board can verify that such QSBC has remitted to the Board $.50 of each and every $1.00 collected under the BPA that year.

A closer look at the BPA, the Order, and the rules and regulations thereunder will show the following. Is a QSBC required to account to the Committee or obtain the Committee's prior approval as to how it expends the assessment funds it retains? No! Is a QSBC required to account to the Board or obtain the Board's prior approval as to how it expends the assessment funds it retains? No! Is a QSBC required to account to the Secretary or obtain the Secretary's prior approval as to how it expends the assessment funds it retains? No! Clearly, expenditure of the assessment funds retained by the QSBCs is outside of the scope of the BPA and outside of the authority of the Board, the Committee and the Secretary.

II. The Decisions of the District Court and of the Court of Appeals in *Frame* Do Not Reject Goetz's Argument That the BPA Is a Tax.

In the Intervenors' Opposition, the Intervenors make the statement that the district court and the Third Circuit Court of Appeals in *Frame* squarely rejected all of the challenges to the BPA which Goetz is raising in this case. *Intervenors' Opp.* 6. This is not true. The argument that the BPA is a tax was never even presented to the Third Circuit in *Frame*.[5] *See Frame*, 885 F.2d at 1125 (footnote 4). In addition, contrary to the position of the Intervenors as expressed in footnote 4 of the *Intervenors' Opposition*, the district court's opinion in *Frame* rests almost entirely upon the premise that the BPA is a tax as is hereafter shown.

Mr. Frame's first argument before the district court in *Frame* was that the BPA was an unlawful delegation of Congress' Taxing Power. Solely for the purpose of considering this first argument, the district court in *Frame* assumed *arguendo* that the BPA was an exercise of Congress' Taxing Power. *Frame*, 658 F. Supp. at 1479. But a careful reading of the remainder of the district court's opinion in *Frame* reveals that the district court's analysis of almost all of the remainder of Mr. Frame's arguments rests very heavily on the conviction that the BPA is a tax. In considering Mr. Frame's Fifth Amendment "taking" argument, the district court in *Frame* makes the following statement:

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[5] Neither was the argument that the BPA is a tax brought before this Court in *Wileman*. *See Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S.Ct. 2130 (1997).

> "Indeed, the power of Congress to impose ***taxes*** is almost immune from constitutional challenge." *Frame*, 658 F. Supp. at 1480 (emphasis added).

Thereafter, in considering Mr. Frame's equal protection argument, the district court in *Frame* used the following rationale:

> "However, in formulating ***taxation*** legislatures possess the greatest freedom of classification. . . . A ***taxing authority*** may impose different specific ***taxes*** upon different trades and professions and may vary the excise upon various products. . . . In summary, if the classification is rationally related to a legitimate government interest the ***tax*** does not violate the right to equal protection.
>
> . . .
>
> Congress could have found that a ***tax*** on the initial sale of cattle was easier to apply than a smaller ***tax*** at every level of the beef industry." *Frame*, 658 F. Supp. at 1480-1481 (emphasis added) (internal quotation marks omitted).

And finally, in considering Mr. Frame's First Amendment arguments, the district court in *Frame* makes the following statement:

> "Although defendants are correct that they are entitled to refuse to associate with other persons and entities, . . . they have cited no cases, and my independent research has uncovered none, in which a valid exercise of ***Congress' taxing power*** violated the First Amendment." *Frame*, 658 F. Supp. at 1481-1482 (emphasis added).

Clearly, the district court in *Frame* was convinced that the BPA is a tax.

III. Congress Never Intended the BPA to Be a Regulation of Interstate Commerce.

Both Glickman and the Intervenors insist that the primary purpose behind the BPA is regulatory rather than to raise revenue. *See Intervenors' Opp.* at 9-10; *Glickman's Opp.* at 5. As their primary support for this position, both Glickman and the Intervenors keep referring to the "findings" contained in § 2901(a) of the BPA. *See Intervenors' Opp.* at 9-10; *Glickman's Opp.* at 7 & 9. However, it must be remembered that the private trade associations within the beef industry which lobbied for the enactment of the BPA also drafted these "findings" into the provisions of the BPA and the Order. *See Aplt. App.* at 404-406. The legislative history of the BPA suggests that Congress never intended the BPA to be a regulation of interstate commerce in the first place:

1.

> "This bill that we are considering is nothing more than enabling legislation. . . . It is not a mandatory program by Government, as some have erroneously charged . . . ." 121 Cong.Rec. 38005 (1975) (statement of Sen. Dole).

2.

> "This is not a Government sponsored program." 121 Cong. Rec. 31440 (1975) (statement of Rep. Albert).

3.

> "This legislation was structured as a 'self-help' measure that would enable the beef industry to employ its own resources and devise its own strategies to increase beef sales, ***while simultaneously avoiding the intrusiveness of government regulation*** and the cost of government 'handouts.'" *Frame*, 885 F.2d at 1122 (emphasis added) (citing the Report of Committee on Agriculture, Beef Research and Information Act, H.R.Rep.No. 452, 94th Cong., 1st Sess. 3 (1975)).

In addition, unlike the statutory structures which were the subjects of the *Head Money Cases* and *Wileman*, the revenue-raising assessment contained in the BPA is its primary and overriding feature. *See Head Money Cases*, 112 U.S. 580, 590 (1894); *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S.Ct. 2130, 2134 (1997). All other provisions of the BPA are merely incidental to and solely implementing such assessment. Clearly, Congress never intended the BPA to be regulatory.

CONCLUSION

As the foregoing shows, the Tenth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. Therefore, this petition for writ of certiorari should be granted.

Respectfully submitted

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